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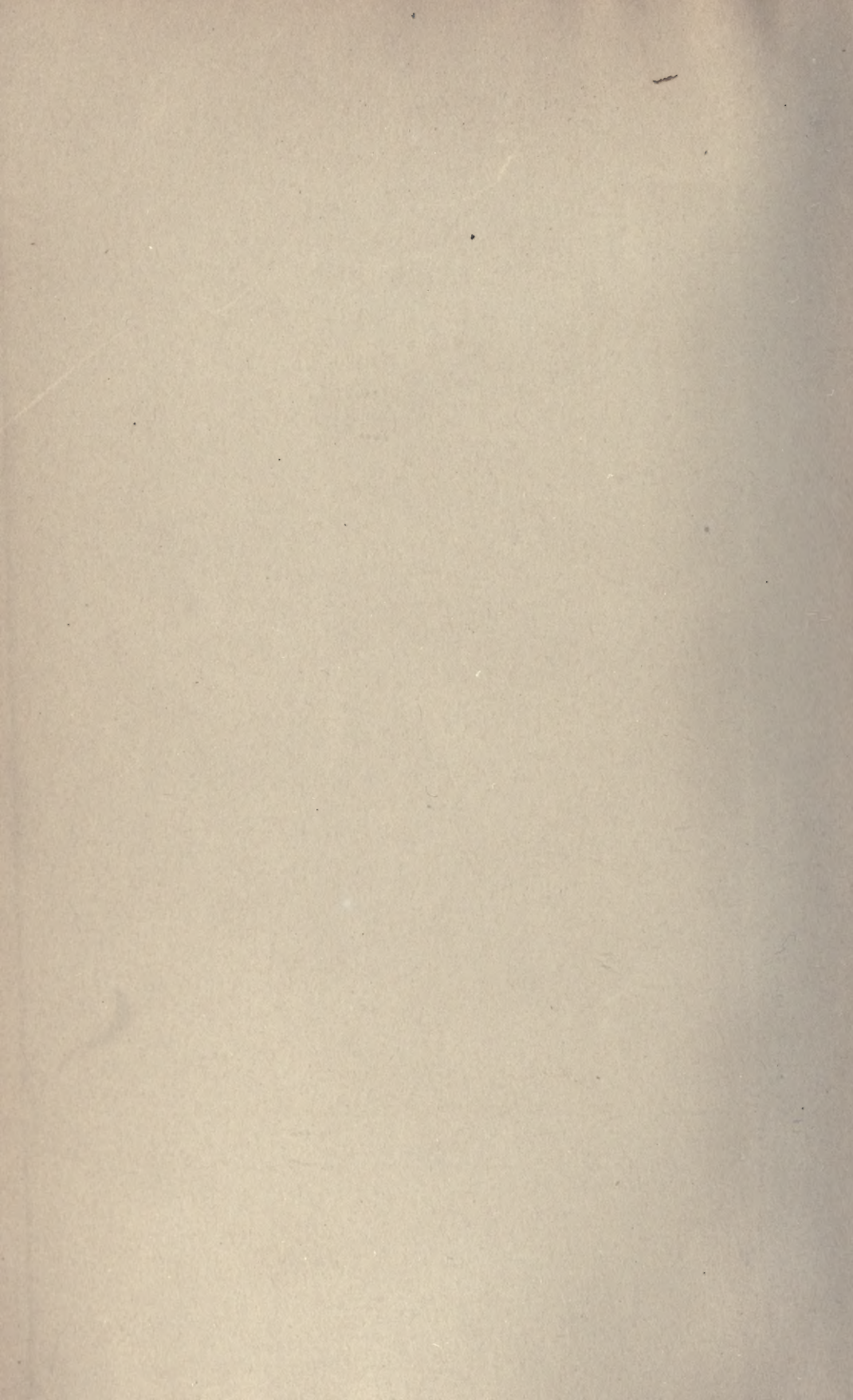


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NO. 1.

ALTERATION OF NEGOTIABLE INSTRUMENTS.

[The following examination of this subject is part of a chapter of a work on "Bills and Notes," for the Students' Series, by MELVILLE M. BIGELOW, Esq. Only the more important of the cases are cited.]

ANOTHER case of want of contract arises where there has been a material unauthorized alteration of the instrument to which the defendant gave his signature. The authorities in general declare that to alter the terms, written or printed, of a negotiable note, bill, or check, after the defendant's signature was written to it, is to destroy its validity against him, even in the hands of a *bona fide* holder for value. The reason is plain. The altered instrument is not the one he signed; and the identity of the one signed has been destroyed.¹

A material alteration within the meaning of the rule stated may be defined thus: Any alteration (1) changing the legal effect of the instrument; (2) made with such intent, or being a final act; (3) without consent; (4) by a party to it, or by one in lawful possession of it, — is a material alteration. The divisions of the definition, as here given, will serve as basis of an analysis of the subject.

¹ *Wade v. Withington*, 1 Allen, 561; *Draper v. Ward*, 112 Mass. 315; *Aldrich v. Smith*, 37 Mich. 468.

First, then, of alterations "changing the legal effect of the instrument." It was at one time considered, and it is still occasionally intimated, that a fraudulent alteration, material or not, would destroy the instrument, because perhaps of the wrongful intent;¹ but that doctrine has been generally abandoned. An immaterial alteration, then, cannot, by the current of authority, have the effect to prevent recovery upon the paper. For example: The plaintiff is holder for value, and the defendant maker of a promissory note sued upon, which does not state any time of payment. The plaintiff afterwards writes in the words "on demand," without the defendant's consent, and with fraudulent intent. The plaintiff is entitled to recover, notwithstanding the alteration, the note being originally payable on demand in legal effect.² Again: The plaintiff is holder for value of an instrument made by the defendant, promising to pay a certain sum of money, upon a condition expressed therein, to a person named. The payee afterwards writes in the words "or bearer," without the defendant's consent. The defendant's liability remains unchanged; the contract, being incapable of negotiability as it was executed, could not be made negotiable by adding the words in question.³

A like case would be made where, after a change of law not governing the instrument in question, an alteration in it is made, expressing no more than what was embraced in the law by which the instrument was governed.⁴ Another case of the kind would arise where an alteration was made conforming to the true intention of the parties, correcting a mistake in the writing.⁵ So to add the words "with grace" to paper entitled by law to grace, or "without grace" to paper not entitled to grace; and so to add the legal rate of interest, as at "six per cent," after the words "with interest:" such additions are immaterial; they have no effect upon the validity of the instrument. In such cases it makes no difference whether

¹ Pigot's Case, 11 Coke, 27 *a*, 2d resolution. The word "fraudulent" is not there used; the language is, "if the obligee himself alters the deed, . . . although it is in words not material, yet the deed is void." No doubt "fraudulent" must be understood.

² Aldons *v.* Cornwell, L. R. 3 Q. B. 573, overruling Pigot's Case, 2d resolution. See Goodenow *v.* Curtis, 33 Mich. 505; Curtis *v.* Goodenow, 24 Mich. 18. But see Bridges *v.* Winters, 42 Miss. 135.

³ Goodenow *v.* Curtis, and Curtis *v.* Goodenow, *supra*.

⁴ Bridges *v.* Winters, 42 Miss. 135.

⁵ McRaven *v.* Crisler, 53 Miss. 542; Clute *v.* Small, 17 Wend. 238; Hervey *v.* Harvey, 15 Maine, 357. But see Miller *v.* Gilleland, 19 Penn. St. 119, by a divided court.

the defendant has consented to the alteration or not; and so of all other cases in which the alteration is immaterial.

It would be difficult to show what alterations are such as to change the legal effect of the instrument in any other way than by specific cases. And then, too, it should be remembered that we are dealing with but part of the definition, and that all the other parts of it must also be met to make a material alteration. In other words, though in a particular case the alteration appears to change the legal effect of the instrument, it may appear that it was not "made with such intent, or being a final act," or one of the other facts may be wanting to make it material.

The following are some of the cases in which the alteration changes, or appears to change, the legal effect of the instrument: An alteration of the date of the instrument;¹ changing "I promise" to "We promise," for such change would convert a several, or a joint and several, into a joint promise;² the addition of an interest clause to an instrument completed without it,³ as, for example, "to bear legal interest,"⁴ or "interest payable annually," or "semi-annually," "quarterly," or otherwise;⁵ striking out the words "after maturity" where interest is made so payable;⁶ changing the name of the payee;⁷ changing "to the order of A" to "to A or bearer;"⁸ adding the words "payable at the Bank of S.,"⁹ though it seems that an acceptor may make a bill payable at no designated place payable at any particular place he will within the town in which by law it is payable;¹⁰ adding another name to that of the maker of a note,¹¹ though the case appears to be differ-

¹ Vance v. Lowther, 1 Ex. D. 176; Wood v. Steele, 6 Wall. 80; Britton v. Dierker, 46 Mo. 591; Emmons v. Meeker, 55 Ind. 321; Kennedy v. Lancaster Bank, 18 Penn. St. 347.

² Humphreys v. Gwillow, 13 N. H. 385.

³ Holmes v. Trumper, 22 Mich. 427; Glover v. Robbins, 49 Ala. 219. As to filling blanks in such cases, see *infra*.

⁴ Lochrane v. Emmerson, 11 Bush, 69.

⁵ Marsh v. Griffin, 42 Iowa, 403; Blakey v. Johnson, 13 Bush, 197; Lamar v. Brown, 56 Ala. 157.

⁶ Brooks v. Allen, 62 Ind. 401.

⁷ Stoddard v. Penniman, 108 Mass. 366; s. c. 113 Mass. 386.

⁸ Union Bank v. Roberts, 45 Wis. 573.

⁹ Southwark Bank v. Gross, 35 Penn. St. 80; Nazro v. Fuller, 24 Wend. 374; Whitesides v. Northern Bank, 10 Bush, 501; Burchfield v. Moore, 3 El. & B. 683.

¹⁰ Troy Bank v. Lauman, 19 N. Y. 477. See Todd v. Bank of Kentucky, 3 Bush, 626; Whitesides v. Northern Bank, *supra*; of the right of an accommodation acceptor of a bill payable generally to designate a particular place of payment.

¹¹ Hamilton v. Hooper, 46 Iowa, 515; Lunt v. Silver, 5 Mo. App. 186; Haskell v.

ent where another surety is added, before delivery, to a note or bill already executed by a surety;¹ adding an attestation clause, for that produces a possible and probable change in the evidence of execution, proof of the signature of the attesting witness proving the execution.²

"Made with such intent, or being a final act." — It may be that the alteration was the result of an accident, as where the intention was to make the change in another instrument; or it may be due to mistake in regard to the terms of agreement, or in computation of amount, or in some other particular. When that is the case, it seems that the identity of the instrument is not destroyed. If the new words have been added merely, they may in principle be struck out by the one who added them on discovering the facts; or if they are written over an erasure of the original words, and the original words cannot well be restored, they may stand, and the explanation given at the trial.³

The right to make such correction appears to be limited to the person who made the change, including possibly his agents and personal representatives. After the paper had passed from his hands it is too late, for his indorsee will have taken the paper as altered, and the only right he can have is upon the altered paper. He did not take it as it stood originally, and hence cannot restore it to its original form, even where that would be physically practicable. The alteration has been allowed to stand by the party who made it, and so has permanently changed the paper; it has become "a final act." Nor would it make any difference, it seems, that the party who made the alteration did not discover his mistake until after he had transferred the instrument; after transferring it his rights over it are gone.

The difference between material alterations made by mistake, and alterations made with intent to change the legal effect of the instrument, is plain: in the case of mistake, the object of the act is to restore the writing to the terms agreed upon; in the case of

Champion, 30 Mo. 136; *Crandall v. First Nat. Bank*, 61 Ind. 349; *Wallace v. Jewell*, 21 Ohio St. 163; *Gardner v. Walsh*, 5 El. & B. 83.

¹ *Crandall v. First Nat. Bank*, *supra*; *Keith v. Goodwin*, 31 Vt. 268, distinguishing *Gardner v. Walsh*, *supra*, and like cases, on the ground that the addition was made after the instrument had been delivered.

² *Adams v. Frye*, 3 Met. 103.

³ Compare *Horst v. Wagner*, 43 Iowa, 373; *Krause v. Meyer*, 32 Iowa, 566.

intelligent intention to change, the object is to destroy the writing as evidence of the terms actually agreed upon. That will serve to explain some of the apparent contradictions of the authorities. Thus, it is laid down that a material alteration by a party will destroy the instrument whether it was fraudulent or not;¹ and it is also laid down that a material alteration will *not* destroy the instrument if it was not fraudulent.² Both statements are true. The case usually presented is one in which the alteration was suffered to remain, and the paper passed as altered to the plaintiff. The alteration is final, and authority conforms to principle, that the plaintiff, though a *bona fide* holder, cannot maintain an action in such a case against any of the non-consenting parties who signed the paper as it stood before the alteration. For example: The plaintiff is payee for value of what purports to be a promissory note signed by the defendants. The instrument originally read, "For value received I promise to pay," etc., "with interest," and so was signed by two persons, the defendants. The note thus executed was for the benefit of the first signer, who afterwards changes the word "I" to "we," and adds after the word "interest" the words "at twelve per cent," without the other defendant's knowledge, supposing himself to have the right to do so; the rate of interest not having been agreed upon when the note was executed, but being afterwards fixed between the first defendant and the plaintiff as inserted. Then the instrument so altered is delivered to the plaintiff. The plaintiff is not entitled to recover against the second defendant, either upon the instrument in its altered or in its original form, though the alteration was not fraudulent.³

Hence the first of the two apparently contradictory propositions is true. But the party having made an innocent mistake in making the alteration may, while the instrument is still in his own hands, discover his mistake and desire to correct it, restoring the instrument to its original state. The alteration not having become final, that may be done, or the case may be treated as if it had been done, or as if no alteration had been made, if actual restoration is impracticable. Hence the second of the two propositions also is correct. This explanation may not indeed align with some of the authorities, for the second proposition has misled the courts in some cases, causing them to hold in general that material alter-

¹ Draper v. Ward, *supra*.

³ Draper v. Ward, *supra*.

² Kountz v. Kennedy, 63 Penn. St. 187.

ations which are not fraudulent are not fatal to the instrument ; but the explanation, it is believed, shows a sound distinction.¹

The general rule, then, may be expanded and stated thus : If the bill, note, or check be altered in a material particular, either by fraud or by an innocent mistake not corrected while the paper is in the hands of the party who made the alteration, it will be destroyed towards all non-consenting parties, and that, too, whether the alteration was made by the party claiming under it, or by any other party to it. And no action can be maintained against non-consenting parties, either upon the altered instrument or upon the instrument as it stood before alteration, even by a *bona fide* holder for value.² The fact that the instrument may have been restored to its original form (after having been passed with the alteration) makes no difference.³ Nor is the alteration to be deemed immaterial by reason of the fact that it is favorable to the defendant,⁴ for still its legal effect is changed, and the identity of the contract signed is destroyed.⁵

"Without Consent." — Consenting parties cannot set up an alteration ; and, among others, all who have signed the contract after the alteration are consenting parties, with one exception, to be stated presently. Thus, if an alteration in the date of a bill of exchange was made with the consent of the acceptor, or if he subsequently assented to it, he will be bound ; and so will all other parties to it becoming such after the alteration, while the prior non-consenting parties may repudiate the instrument.⁶

The exception referred to arises in the acceptance of a bill of exchange. A bill may have been altered after it left the drawer's

¹ The Pennsylvania courts permit recovery by a *bona fide* holder for value to the amount of the instrument as originally executed, when the sum has been raised in such a way as not to excite the suspicion of a man in ordinary business. *Worrall v. Gheen*, 39 Penn. St. 388 ; *Garrard v. Haddan*, 67 Penn. St. 82 ; *Phelan v. Moss*, Id. 59. See also *Brown v. Reed*, 79 Penn. St. 370 ; *Neff v. Horner*, 63 Penn. St. 327. That is very well if the alteration was not fraudulent or otherwise final ; but the Pennsylvania cases do not make the distinction.

² See, besides the cases *supra*, *Smith v. Mace*, 44 N. H. 553 ; *Holmes v. Trumper*, 22 Mich. 427 ; *Greenfield Bank v. Stowell*, 123 Mass. 196 ; *Citizens' Bank v. Richmond*, 121 Mass. 110 ; *Woolfolk v. Bank of America*, 10 Bush, 504, 517 ; *Morehead v. Parkersburg Bank*, 5 W. Va. 74 ; *Burchfield v. Moore*, 3 El. & B. 683.

³ *Citizens' Bank v. Richmond*, *supra*.

⁴ *Humphreys v. Gwillow*, 13 N. H. 385, 387.

⁵ Id. ; *Draper v. Ward*, 1 Allen, 561 ; *Chism v. Toomer*, 27 Ark. 108.

⁶ *Paton v. Winter*, 1 Taunt. 420 ; *Tarleton v. Shingler*, 7 C. B. 812.

hands and before acceptance ; in such a case, though the acceptor appears to have accepted the bill in its altered form, he has not done so in law, — he has presumably intended to accept the bill which the drawer drew. If he accepted the bill without notice of the alteration, and without negligence, he is not bound by his act. For example : The defendants being *bona fide* holders for value of a bill of exchange drawn upon the plaintiffs, the bill is presented to the plaintiffs for acceptance, and accepted, an alteration of the sum payable, of the date, and of the payee's name, having been made in it after it passed from the drawer's hands and before acceptance. The acceptance was without notice of the alteration, and without negligence. Afterwards the plaintiffs pay the bill, and then, on discovering the alteration, bring the present suit to recover back the sum paid. They are entitled to recover.¹

The reason is plain. The drawee of a bill of exchange accepts, if he does accept, on the ground that payment by him gives him the right to charge the amount to the drawer as payment made upon the drawer's order ;² he would not accept, except upon that footing, or the undertaking of some one else to protect him. But where the bill is altered after it has left the drawer's hands, the acceptor cannot on payment make such charge ; the drawer has not directed him to pay the altered bill. Acceptance then is not an admission of the genuineness of the contents of the bill so as to work an estoppel against him in favor of a *bona fide* holder for value.

If, however, the drawer himself has altered the bill, or consented to the alteration of it, after drawing it, the case will be different, for he will then have directed the drawee to accept and pay the bill as altered. That distinction must be taken as the explanation of one or two cases, which at first may seem to hold broadly, that acceptance of an altered bill makes the acceptor liable upon the bill as altered. For example : The plaintiff is payee of a bill of exchange accepted by the defendant and now sued upon. The bill as originally drawn was payable three days after date, and in that condition was indorsed by the payee for the accommodation of the drawer, who now changes the word "three" to "thirty," and passes

¹ Compare *Bank of Commerce v. Union Bank*, 3 Comst. 230, bill paid at sight. See *Clews v. Bank of New York*, 89 N. Y. 418. Acceptance is an admission of the drawer's hand (as will be seen later), but not of the rest of the writing. *Id.*

² Compare the language of the court in *Hortsmann v. Henshaw*, 11 How. 177.

the bill to A. The fact is afterwards discovered, and an arrangement made by which the bill is returned by A to the plaintiff; then it is accepted by the defendant without knowledge or notice of the alteration. The defendant is liable.¹

"By a party to it, or by one in lawful possession of it." — An alteration made by a stranger has no effect upon the validity of the instrument if it is possible to show what its language was before the act; the alteration must be made by a party, or by one in lawful possession, — all others are strangers, — in order to destroy the instrument.² By a "party" is meant any one who has placed his signature to it, or has been owner of or interested in the instrument; by "one in lawful possession," any one to whom the owner or other person interested in the instrument has intrusted it.³

If the blank has been wrongfully filled by one who has been intrusted with the instrument, with power to fill the blank or not in a certain contingency, the act will not constitute a material alteration, though the paper was delivered as complete. The case is one of agency, and the party whose confidence has been betrayed — that is, the principal — will be bound in favor of a *bona fide* holder for value.⁴ That assumes, however, that no alteration of the written or printed language is made,⁵ unless the facts indicate an authority to alter.⁶

The mere fact that one who has been acting as authorized agent of the defendant made the alteration, will not bind the supposed principal, for agency confers no authority to commit a crime.⁷ No relation of agency exists between co-signers, as such, of an instrument; and hence an alteration made by one co-maker of a promissory note without the consent of others, though before delivery,

¹ Ward v. Allen, 2 Met. 53. There were other complicating facts in this case, but they have no bearing upon the point now under consideration. The first headnote of the case is too broad. In Langton v. Lazarus, 5 Mees. & W. 629, also, the alteration was made by the drawer. That must be understood as the essential fact in reference to the acceptor's liability.

² Langenberger v. Kroeger, 48 Cal. 147; Brooks v. Allen, 62 Ind. 401; Ætna Ins. Co. v. Winchester, 43 Conn. 391.

³ See Brooks v. Allen, and Ætna Ins. Co. v. Winchester, *supra*.

⁴ Belknap v. National Bank, 100 Mass. 376, 381; Greenfield Bank v. Stowell, 123 Mass. 196, 203.

⁵ Belknap v. National Bank, *supra*.

⁶ Ætna Ins. Co. v. Winchester, 43 Conn. 391.

⁷ Id.; Brooks v. Allen, 62 Ind. 401.

if the other maker has already signed, is a destruction of the instrument towards the latter.¹

Thus far of the meaning of the term "material alteration." But suppose that the defendant, being maker of a promissory note, or drawer of a bill of exchange or a check, has facilitated the alteration, — as, for example, by leaving a blank space in the instrument which has afterwards been fraudulently filled out, — is he now estopped or barred from setting up the alteration? It must be understood that the case under consideration is one in which the instrument left the hands of the maker or drawer as a completed instrument; cases of intrusting one's blank signature or one's signature to an uncompleted instrument stand upon a very different footing, as will be seen in another place.

It has sometimes been held that if the maker or the drawer, by leaving a blank, has made it easy for the wrong-doer to fill the blank, and so alter the instrument, he rather than the *bona fide* holder for value must bear the loss. This is commonly put upon the ground of (supposed) negligence, sometimes upon the ground that, of two innocent parties, he who occasioned the loss must bear the loss. The last is at best but a very imperfect statement of law, and cannot be taken as satisfactory in any such case; and the first, the ground of negligence, finds an answer in what has elsewhere been said in regard to delivery, — to wit, the negligence, if it be admitted that there is negligence, is not the legal, otherwise called the proximate, cause, in ordinary cases, of the alteration. To be the legal cause of what was done, the negligence must have been in or in immediate connection with the alteration: the alteration must have been the natural or the probable result of the negligence.²

Though there are then cases to the contrary,³ it may be safely

¹ Wood v. Steele, 6 Wall. 80; Greenfield Bank v. Stowell, 123 Mass. 196; Wood v. Draper, 112 Mass. 315.

² In a case of the fraudulent transfer of stock by the plaintiffs' clerk, Bowen, L. J., said: "The proximate cause" — that is, the legal cause — "was the felony and crime" of the clerk, "and it cannot be said that the felony was either the natural, or likely, or necessary, or direct consequence of the carelessness of the plaintiffs." Merchants of the Staple v. Bank of England, 21 Q. B. Div. 160. See also Bank of Ireland v. Evans Charities, 5 H. L. Cas. 389; Swan v. North British Co., 2 Hurl. & N. 175, 182; Arnold v. Cheque Bank, 1 C. P. Div. 578; Bigelow, Estoppel, 655, 656, 5th ed.

³ Isnard v. Torres, 10 La. An. 103; Capital Bank v. Armstrong, 62 Mo. 59; Iron

stated that in principle, and by the weight of authority, a material alteration by a party or by one in lawful possession made in a note, bill, or check delivered as a completed instrument, by writing or printing words in a blank space, destroys the instrument, so that no action can be maintained against the maker or drawer or other non-consenting parties, even by a *bona fide* holder for value.¹ Nor does it make any difference whether the blank was left in the body or at the end of the instrument. For example: The plaintiff is a *bona fide* holder for value of a promissory note sued upon, purporting to have been signed by the defendant as maker, and containing at the end the words "10 per cent." What the defendant did sign was the instrument in question, without those words, delivering the same as a completed undertaking. The instrument signed closed with the words "with interest at," after which there was a blank, which after delivery to the payee was filled in with the words above quoted, "10 per cent." The defendant is not liable, the alteration having the effect to destroy the instrument.²

The contrary view, which has found favor in some of our courts, appears to have been based originally upon a misunderstanding of the effect of a decision of the English Common Pleas in relation to a blank space left in a check just before the amount for which the check had been made payable; the drawer's clerk, *by whom* the check was drawn, and to whom the check was then intrusted to obtain payment, having raised the sum payable by writing certain words in the blank.³ But the contest there was between the drawer of the check and his banker, the drawee. No case arose of the claim of a *bona fide* holder for value; and though it was held that the drawer must under the circumstances bear the loss, nothing was said about estoppel. Moreover, there was something approaching agency in the facts.⁴ The case is therefore no authority for the position upon which some courts have acted, that the drawer of a check or bill, or the maker of a note, is estopped or barred from setting up the alteration in a suit by the holder of the instrument.

Mountain Bank *v.* Murdock, Id. 70; Redington *v.* Woods, 45 Cal. 406. See also Worrall *v.* Gheen, 39 Penn. St. 388.

¹ Holmes *v.* Trumper, 22 Mich. 427; Greenfield Bank *v.* Stowell, 123 Mass. 196, and cases reviewed therein.

² Holmes *v.* Trumper, *supra*. See also McGrath *v.* Clark, 56 N. Y. 34. But see Redlich *v.* Doll, 54 N. Y. 234, and *quare*.

³ Young *v.* Grote, 4 Bing. 253.

⁴ See Holmes *v.* Trumper, *supra*; Greenfield Bank *v.* Stowell, *supra*.

The English courts, followed by some of the ablest of our own, have plainly repudiated the idea of any estoppel, and have declared that the decision must be understood as confined in its bearing to questions arising upon facts of the same nature.¹ The case, if to be regarded as rightly decided, is clearly distinguishable from cases such as we have been considering.²

It has well been questioned whether the leaving of blanks can ordinarily amount to negligence at all, not to say negligence the legal cause of the loss; for it is impracticable to execute an instrument, in ordinary business, without leaving blanks somewhere. There must be a blank at the beginning or at the end, unless — what not the most careful man ever does — a line is drawn before the first word and after the last, clean to the signature. Universal practice cannot be negligence.³

Marginal terms, such as conditions, stipulations, and the like, not being mere memoranda of facts, such as the consideration, — in other words, marginal terms which are intended to be part of the written contract, — are treated by the better authorities as inseparable from the main writing to which the signature is given. And it makes no difference whether such marginalia are signed or not. Accordingly, to remove such terms, by cutting them off or in any other way, without consent, will be fatal. There is no distinction by the better authorities, for there are decisions to the contrary, between cases of that sort and cases of the alteration of

¹ *Swan v. North British Co.*, 2 Hurl. & C. 175, 189, 190; *Halifax Union v. Wheelwright*, L. R. 10 Ex. 183, 192; *Arnold v. Cheque Bank*, 1 C. P. Div. 578, 587, 588; *Greenfield Bank v. Stowell*, 123 Mass. 196, 200, 201; *Holmes v. Trumper*, 22 Mich. 427; L. C. 544, 551, 552.

² The check had been left in blank entirely, save signature, by the drawer with his wife for her use in his absence, and the wife employed the clerk to fill in the sum required. He did so, skilfully leaving the blank before "fifty," written with a small "f;" and then, being intrusted with the check to draw the money, he wrote in the words mentioned. That point is dwelt upon in *Holmes v. Trumper*, *supra*, as a "very important circumstance." The court there says: "The check was filled up by the plaintiff's clerk, the alteration made and the money drawn by him in person, and the plaintiff, by employing him [italics by the court], as he did, as his clerk and (through his wife) as his agent to fill the check and in person to draw the money from the bankers, might well be held to have placed a confidence in him for which he should be responsible, or at least to have authorized the bankers to place confidence in him." And so the court itself in *Young v. Grote* distinguish *Hall v. Fuller*, 5 Barn. & C. 750, decided directly the other way. See also *Greenfield Bank v. Stowell*, *supra*.

³ See the language of the court in *Holmes v. Trumper*, *supra*, and the quotation from it in *Greenfield Bank v. Stowell*, *supra*.

language in the body of the signed instrument. The instrument signed has been destroyed, and no action upon it can be maintained either in its present or in its original form.¹ And the same is plainly true of the cutting in two of instruments dexterously constructed, so as by cutting through them at a particular place one part will be left in form a perfect contract, different in effect from the instrument uncut.² In cases such as these there is ordinarily not even the semblance of negligence; and it is difficult to conceive how the defendant can be treated as having assented, or how he can be barred from showing that he never assented to the supposed contract.

Still another case of want of contract arises where between the plaintiff and the defendant there is a forged indorsement. Each person who signs a negotiable contract of the law merchant undertakes to pay to any one who acquires title according to the law merchant. That law requires, not that every intervening holder of the paper between the plaintiff and the defendant should have been owner of the instrument, or even the lawful holder of it, but that every intervening indorsement should be genuine. The holder may have a good claim against later indorsers; back of the forged indorsement he cannot go, for want of legal assent on the part of the signers.³ For example: The plaintiffs sue the defendants to recover the amount paid by mistake by the plaintiffs as acceptors to the defendants as holders of a bill of exchange payable to A, whose indorsement had been forged. The defendants were *bona fide* holders for value. The plaintiffs are entitled to recover.⁴

There are one or two nominal exceptions to this rule. The maker of a note, or the drawer of a bill or a check, can make it payable to whomsoever he will; and if he makes it payable to a person having no interest in it he may indorse that person's name,

¹ *Gerrish v. Glines*, 56 N. H. 9; *Johnson v. Heagan*, 23 Me. 329; *Shaw v. First Methodist Soc.*, 8 Met. 223; *Fletcher v. Blodgett*, 16 Vt. 26; *Bay v. Shrader*, 50 Miss. 326; *Benedict v. Cowden*, 49 N. Y. 396; *Bank of America v. Woodworth*, 18 Johns. 315; s. c. 19 Johns. 391; *Brill v. Crick*, 1 Mees. & W. 232. See also *Franklin Sav. Inst. v. Reed*, 125 Mass. 365; *Benthall v. Hildreth*, 2 Gray, 288; *Heywood v. Perrin*, 10 Pick. 228. But see *Cornell v. Nebeker*, 58 Ind. 425; *Nebeker v. Cutsinger*, 48 Ind. 436; *Zimmerman v. Rote*, 75 Penn. St. 108; *Brown v. Reed*, 79 Penn. St. 370.

² *Brown v. Reed*, *supra*.

³ *Canal Bank v. Bank of Albany*, 1 Hill, 287; *Hortsman v. Henshaw*, 11 How. 177; *Arnold v. Cheque Bank*, 1 C. P. D. 578.

⁴ *Canal Bank v. Bank of Albany*, *supra*.

and put the instrument into circulation. So far as the question of liability upon the instrument is concerned, it would make no difference whether the maker or drawer had the authority of the payee to indorse his name or not; because, having once used the payee's name for the purpose of putting the paper into circulation, he could not afterwards deny his right to do so. Indeed, it could not affect the case that the payee was a party in interest, so far as the liability of the maker or drawer, on the instrument, is concerned. The act might be unlawful for other purposes; but in a suit upon the instrument the defendant could not allege that he had forged the payee's name. For example: The plaintiff is suing to recover the amount of a bill of exchange paid by him as acceptor to the defendant, a *bona fide* holder for value, one of the drawers of the bill having forged the payee's name and procured a discount of the bill. The plaintiff did not know of the forgery when he paid. He is not entitled to recover.¹

The example, it will be observed, goes a step further than the rule just stated. But the reason is obvious: the acceptor had paid according to the order of the drawer. Such payment entitled him to charge the sum to the drawer; and, as we have seen, where the acceptor (or drawee) can do that, his act of acceptance (or payment) is binding. In such a case, then, the *bona fide* holder for value has a valid claim back of the forged indorsement, contrary to the rule in ordinary cases.

Forgery of the signature of the drawer of a bill of exchange stands upon a footing of its own. Were it not for a special rule of law, founded upon the natural effect of acceptance, the case would be in no wise peculiar, and the courts would therefore hold that no action could be maintained against the acceptor by any person. But the drawer and the drawee are, or they are conclusively assumed to be, correspondents; they are ordinarily in close business relations, the drawee usually holding funds of the drawer, and often being his banker. The drawee is therefore presumably familiar with the hand of the drawer, and when he accepts a bill purporting to be the drawer's, he thereby asserts or admits that

¹ Coghill v. American Bank, 1 Comst. 113. See Hortsman v. Henshaw, *supra*. Where the paper is payable to a fictitious party, it may, it seems, be treated as payable to bearer. See Coghill v. American Bank, *supra*; Cooper v. Meyer, 10 Barn. & C. 468; s. c. 5 Man. & R. 387; Minet v. Gibson, 3 T. R. 81; s. c. 1 H. Black. 569; Bank of England v. Vagliano, 1891, A. C. 107.

the signature is the genuine signature of the drawer. That may well have misled a purchaser of the bill; and the law therefore holds the acceptor, by reason of his acceptance, estopped to deny his liability to a purchaser who is a *bona fide* holder for value; the acceptance in such a case is binding, notwithstanding the fact that the drawer's signature is a forgery. For example: The plaintiff sues to recover the amount of a bill of exchange which as acceptor he has paid to the defendant, a *bona fide* holder for value, who had discounted the bill after acceptance. The drawer's signature is forged, but the plaintiff did not know the fact when he accepted. The plaintiff is not entitled to recover; it was his duty to satisfy himself of the drawer's hand before acceptance, and his acceptance is a conclusive admission in favor of the defendant of the genuineness of the signature.¹

The case from which the example is taken went still further. Another bill had been paid by the plaintiff on presentment without acceptance, the defendant having *already* taken it; and the same rule was applied, — the plaintiff was not allowed to show that the drawer's signature had been forged. The case, therefore, appears to go the length of holding the drawee bound by his act, whether of acceptance or payment, though that act could not have misled the holder into his purchase of the bill. The rule would then be unbending; acceptance or payment would in itself be binding in favor of a *bona fide* holder.

The later authorities appear to repudiate that doctrine, and to put the case on the ground which the example fairly implies, — of estoppel. That is to say, acceptance binds the drawee in favor of a *bona fide* holder for value who took the bill after the acceptance, but not in favor of one who took it before acceptance.² That is probably the right view. Practice of the parties or usage may also affect the case. Thus it is laid down that the acceptor may allege the want of genuineness of the drawer's signature, if he can show that by a settled course of business between the parties, or by a general custom of the place, the holder took upon himself the duty of exercising some particular precaution to prevent the loss, and failed of performing that duty.³ So, also, it has been held that if

¹ Price v. Neal, 3 Burr. 1354. That is the leading case, and it has had a long following. See Bigelow, Estoppel, 481 *et seq.*, 5th ed.

² McKleroy v. Southern Bank, 14 La. An. 458. See Bigelow, Estoppel, 419, 5th ed.

³ Ellis v. Ohio Ins. Co., 4 Ohio St. 628.

the holder himself indorsed the paper, as for collection, before it was presented to the drawee, the drawee will not be estopped from alleging that the drawer's signature was forged, because now the holder is thought to have asserted the genuineness of the bill, and to have misled the drawee.¹ And, again, if the owner of the bill in presenting it to the drawee withhold from him important information which the former has touching the question of genuineness, the acceptance will not be binding.²

It should be remembered that the estoppel goes no further than to cut off the acceptor's right to set up the want of genuineness of the drawer's signature, and that his acceptance does not preclude him from asserting that other signatures, with an exception above mentioned (where the drawer indorses the payee's name), are not genuine, or that the body of the bill has been altered.

¹ *National Bank of N. A. v. Bangs*, 106 Mass. 441.

² *First National Bank v. Ricker*, 71 Ill. 439.

CONGRESS SHOULD ABROGATE FEDERAL JURISDICTION OVER STATE CORPORATIONS.

THE latest Judiciary Act of Congress, March 3, 1887, gives to the Circuit Courts cognizance of suits in favor of assignees, against corporations as parties, upon their obligations passing by delivery.

Here, for the first time in our history, the word "corporation" appears in a Judiciary Act. How it happened will be seen below.

There is no authority in the Constitution for extending the judicial power of the United States to suits against corporations created by the States, unless corporations are included within the word "citizens," in the clause whereby the States, in adopting the Constitution, granted to the general government judicial power over controversies between citizens of different States, — that is to say, unless a corporation created by a State is a citizen of that State, the same as a natural person born or naturalized in the United States and residing in that State; and this every lawyer and every layman knows is not so, no matter what any court may have said to the contrary.

Before the adoption of the Constitution the States had exclusive jurisdiction over suits between private corporations of the States in all cases; and after the adoption of the Constitution the State courts possessed and exercised the same exclusive jurisdiction, except where all the members of a corporation, a party to a suit, were shown to be citizens of the State creating it, and where the opposite party was shown to be a citizen of another State.

This exclusive jurisdiction the courts of the States retained until 1844, when the Supreme Court made a construction of the Constitution which operated to deprive the State courts of this exclusive jurisdiction, and to make it concurrent with the Circuit Courts of the United States, and ultimately to make it (as it is at present) practically exclusive in the latter, under the operation of the Removal Acts.

Under the construction given by the Supreme Court to the word "citizens" during the period when that court was the strongest in

its whole history, and when its Bar was the ablest, — from 1789 to 1844, — it was undoubtingly and unanimously held that there was no jurisdiction in the Circuit Courts over corporations existing under the laws of the States, as parties to suits, except where every one of the members of the corporation was a citizen of the State creating it, and was averred to be such.¹

Obviously, the word "citizens" in that clause of the Constitution extending the Federal judicial power to controversies between citizens of different States refers to human beings, and not to legal aggregations composed of them, no one of whom might be a citizen of the State creating the legal aggregation. We know that the existence of a corporation independent of its members is a myth, and that the rights of a corporation are in reality the rights of the persons who compose them. The Constitution of the United States does not deal with myths; and, accordingly, it was said by the great Chief Justice in the *Deveaux* case that the legal aggregation was certainly not a citizen, and that the jurisdiction must depend upon the rights of the members to sue; and he further said that such had been the universal understanding of the subject. Mr. Justice Johnson declared that the *Deveaux* case was one of the canons of the court.² Mr. Justice Story laid down that a corporation is not a citizen in the sense of the Constitution with respect to right of suit.³ Some writers, indeed, say that this doctrine was inconvenient and narrow, and that the later cases reversing it are satisfactory and salutary. But these adjectives are wide of the mark. The real question is, Did the States ever grant to the general government any such jurisdiction as is seized upon in the reversing cases? And the answer to this question must be in the negative. Those cases finally settle on the doctrine that a corporation may sue or be sued as a citizen of the State creating it, upon the *presumption* that all the members are citizens of that State.⁴

If anything within the domain of legal discussion can be said to be certain, it is that there is no warrant in the Constitution for

¹ *Strawbridge v. Curtiss*, 3 Cranch, 267; *Bank v. Deveaux*, 5 Cranch, 61; *Hope Ins. Co. v. Boardman*, 5 Cranch, 57; *Sullivan v. Fulton Co.*, 6 Wheat. 450; *Breithaupt v. Bank*, 1 Pet. 238; *Bank v. Slocomb*, 14 Pet. 60; *Sewing-Machine Cases*, 18 Wall. 574; *Shaw v. Quincy Co.*, 145 U. S. 451.

² *Bank v. Planters' Bank*, 9 Wheat. 911.

³ 2 Com. Const. § 1695.

⁴ *O. & M. R. R. v. Wheeler*, 1 Black. 296; *Steamship Co. v. Tugman*, 106 U. S. 121.

indulging in any such presumption, and thereby depriving the courts of the States of a jurisdiction never surrendered.

Reasons different from the above presumption were at first assigned for seizing their jurisdiction, — a consciousness of going beyond the set bounds being evident on perusal of the opinions. In the *Louisville Railroad case*,¹ which first made the break, a corporation is said to be an inhabitant of the State creating it, and "therefore" a citizen of that State "as much as a natural person." In *Covington County v. Shepherd*² it is said that the existence and domicile of the corporation are established by a State statute of which the court takes judicial notice, and that therefore an averment of the citizenship of the members is enough. But if the court would take judicial notice of the State statutes in reference to the erection of corporations, the court would see (if it did not purposely shut its eyes) that in not one of all the States do those statutes require that all the incorporators shall be citizens of the State. In *Covington County v. Shepherd* the idea is repudiated that the corporation itself can be a citizen, notwithstanding it was fully and positively declared in the *Louisville case*. At present the averment is required to be made that the corporation is a citizen, and the *Louisville case* is approved on that point in 1892.³

But the *real* ground of the later decisions has been a determination to maintain the jurisdiction at all hazards ; and so Judge Bradley plainly says.⁴ His language is, that the court "was impelled" to "get rid of the troublesome stockholder who happened to be a citizen of the same State with the opposite party, and who almost always appeared in the case." In other words, there was almost always some citizen who was tenacious of his right, under the Constitution, to have the case heard in the State court ; and the Federal court, in order to "get rid" of his sound objection, manufactured a presumption that the objector was not what he actually was, — a citizen of the same State with the opposite party !

Justices Catron, Daniel, and Campbell, three Democratic judges, declared that "this assumption of citizenship for a corporation is a mere evasion of the limits prescribed to the United States courts by the Constitution."⁵

¹ *Louisville R. R. Co. v. Letson*, 2 How. 193.

² *Covington Co. v. Shepherd*, 20 How. 233.

³ *Shaw v. Quincy Co.*, 145 U. S. 451 ; *So. Pac. Co. v. Denton*, 146 U. S. 205.

⁴ *Removal Cases*, 100 U. S. 480, *middle*.

⁵ *N. Ind. R. R. v. Mich. C. R. R.*, 15 How. 249.

This is unquestionably so ; and the later decisions are a deliberate invasion of the rights of the States.

These States are independent political communities, possessing all the judicial power which they have not ceded to the general government by the Constitution ; and by ceding power over controversies between citizens of different States, they confessedly did not cede power over controversies between corporations of different States. The States never would have consented to deprive their citizens of a resort to their own tribunals in suits concerning corporations *arising under State laws and involving no Federal question*. But this deprivation is every day's experience of the clients of a lawyer in large practice at the present time.

The States, within the limits of their powers not granted by them to the general government, are as independent of that government as that government, within its sphere, is independent of the States.¹ These questions of jurisdiction of courts are questions of power between the two (qualified) sovereignties ; and by the existing doctrine the judicial power of the States over their own corporations is seized, and a jurisdiction is usurped which is admittedly not derivable from the language of the Constitution, and which is attempted to be supported by an unwarranted presumption against known facts which would oust the jurisdiction.

"Corporation" seems to have been a word to conjure with.

In all controversies disconnected from corporations, each individual having any joint or several interest on one side must be a citizen of a different State from that of which any person on the other side is a citizen.² And the rule is held not changed even in a suit by a joint-stock company, organized under the law of a State, and authorized by a public statute of the State to bring suit in the name of its president. Such a company is not allowed to sue, because not incorporated.³ And yet the Circuit Courts have declared that the same reasons may be given for taking jurisdiction in the latter case as in the case of corporations, and have actually exercised the jurisdiction.⁴

¹ *Collector v. Day*, 11 Wall. 124 ; *Texas v. White*, 7 Wall. 725.

² *Bryant v. Rich*, 106 Mass. 102 ; *Blake v. McKim*, 103 U. S. 339 ; *Sewing-Machine Cases*, 18 Wall. 574, 575 ; *Smith v. Lyon*, 133 U. S. 319.

³ *Chapman v. Barney*, 129 U. S. 682.

⁴ *Imperial Co. v. Wyman*, 38 Fed. Rep. 529 ; *Maltz v. Amer. Exp. Co.*, 1 Flippin, 611 ; *Fargo v. Louisville R.*, 6 Fed. Rep. 787, Gresham, J.

Congress should interfere, and abrogate the jurisdiction. It is axiomatic that the Circuit Courts can exercise no jurisdiction given by the Constitution which has not been conferred by Congress upon the Circuit Courts by statute. Plainly, what Congress has granted it can take away. And as the courts maintain that Congress, in giving jurisdiction to the Circuit Courts as to citizens of different States, has granted jurisdiction over corporations, as citizens, this jurisdiction Congress can take away, and should take away, because it was never surrendered by the States, but rests upon a mere gloss of the Supreme Court. That is a viperous gloss, saith Coke, which eats out the bowels of the text. "*Glossa viperina est quæ corrodit viscera textus.*"¹

The striking anomaly should no longer exist that if an individual inhabitant of any State is a member of a corporation of any State, suing or sued, he is conclusively presumed to be a citizen of that State where the corporation is organized; but if he himself sues, or is sued, it must be averred and proved that he is a citizen.

This fiction, invented by the court, is the sole foundation of that enormous mass of litigation which has so filled the Circuit and Supreme Courts as to lead recently to the establishment of the intermediate Courts of Appeal. And the reports of these latter courts already show that the bulk of their business rests upon the invented jurisdiction.

This invention was of little importance, and attracted comparatively little attention, for many years after it was made, because the number of corporations, although large, was not enormous. But now every day witnesses a great brood of new ones. Legislatures no longer make them. Every Tom, Dick, and Harry make them, to run a corner grocery. In *Covington Co. v. Shepherd*, above, the court took jurisdiction because it could judicially notice the special charter of the corporation. But now the corporation is the production of private individuals, by their mere act (which cannot be judicially noticed), assuming corporate name and powers, *ex parte*, without any supervision of a legislature.²

One of two things must come to pass: either the invented jurisdiction must be taken away by Act of Congress, or additional Federal courts must ultimately be established.

¹ *Case of the Marshalsea*, 10 Coke, 70.

² *Oregon Co. v. Oregonian Co.*, 130 U. S. 26; *Central Co. v. Pullman's Co.*, 139 U. S. 49.

Congress should not only abrogate the law manufactured by the courts, as above stated, but should repeal that portion of the Judiciary Act of 1887,¹ mentioned at the beginning of this article, giving a certain jurisdiction, in terms, over corporations. This law is administered as recognizing corporations as parties to suits.²

This vicious provision is little known, and has not excited observation or comment. It should be repealed, — because it proceeds upon the unfounded presumption above stated ; because it permits controversies between citizens of the same State to be brought within the grasp of the Federal courts, by assigning causes of action on corporation paper to a resident citizen of another State, thus indefinitely increasing the jurisdiction of the Federal courts ; and because it makes a distinction between individual and corporation paper in favor of the corporation.

The general object of this Act was to *curtail* the jurisdiction of the Circuit Courts.³ In view of this, How did this obnoxious provision as to corporation paper creep in ? In this way : The bill was introduced by a Democrat into a Democratic House ; but when it went to the Republican Senate (the stronghold of corporate influence), this provision was there inserted by an amendment excepting corporations from the denial of jurisdiction over suits by assignees unless the assignor could have sued.⁴

Under this Senate amendment the large and increasing classes of State corporations, issuing great numbers of securities, negotiable by delivery, are now under the cognizance of the Circuit Courts whenever those securities are in the hands of any subsequent holders, although the transfer may have been solely to enable the holders to get into those courts, and although the transferor could not have sued there, and although jurisdiction over these corporations has never been surrendered by the States.

By § 11 of the original Judiciary Act of 1789 the policy was established of preventing the making of assignments for the pur-

¹ 1 Supp't R. S. U. S., 2d ed., 612. Same Act, *appendix*, 120 U. S. 786 (in parallel columns with the previous Judiciary Act).

² *Newgass v. N. O.*, 33 Fed. Rep. 196 ; *Rollins v. Chaffee Co.*, 34 Fed. Rep. 91 ; *Wilson v. Knox Co.*, 43 Fed. Rep. 482 ; *Bank v. Barling*, 46 Fed. Rep. 358 ; s. c. (U. S. App.), 50 Fed. Rep. 260 ; *Ambler v. Eppinger*, 137 U. S. 482.

³ *Smith v. Lyon*, 133 U. S. 320 ; *Re Penn. Co.*, 137 U. S. 434 ; *Fisk v. Henarie*, 142 U. S. 467 ; *Shaw v. Quincy Co.*, 145 U. S. 449.

⁴ 18 Cong. Rec. 646.

pose of giving jurisdiction to the court, — foreign bills only being excepted, in order that their circulation might not be impeded. It was subsequently held that this section, preventing suits by assignees, did not apply to holders of paper payable to bearer and executed by an individual.¹ As an outgrowth of this doctrine, or "superfœtation" (to use a phrase of Caleb Cushing's), the section was then held not to apply to holders of such paper when executed by a corporation.² Now comes the Judiciary Act of 1887; and for the purpose of curtailing the jurisdiction, partially abrogates the exemption from the restriction of suit as created by these decisions. But, departing from the policy of curtailment, the Act expressly authorizes suits by transferees of corporation paper. And this although the whole basis of the previous judicial ruling as to corporations was the previous judicial ruling as to individuals. Obviously the words, "if such instrument be payable to bearer and be not made by any corporation," are an excrescence on the face of the Act of 1887, at war with the whole purpose and policy of the Act, and should be eliminated by an amending Act.

It is to be hoped that the present Congress, Democratic in all its branches, will enact that the Circuit Courts shall not take jurisdiction of controversies between corporations created by the States in like manner as they may by law take jurisdiction of controversies between citizens of such States.

If Congress will not interfere, the question should be made an issue in selecting a new House, and should be agitated before the people.

The State courts, in case of such enactment, would resume their original and rightful exclusive jurisdiction, of which they have been deprived by the usurpation of the Federal courts.

The State courts are not distant from the door of any suitor. But a corporation, composed perhaps of his own neighbors and fellow-citizens (who have signed articles under the law of another State), may summon him from his home court, hundreds and even thousands of miles, into the Federal tribunals, when all the real parties, and all the witnesses, and the subject-matter of the suit, may be located at the place of his home State court. It is really a wonder that the States have submitted to the oppression and hardship undergone by their citizens in such cases.

¹ Bullard v. Bell, 1 Mason, 243.

² White v. V. & M. Co., 21 How. 575.

"Judicial duty is not less fitly performed by declining ungranted jurisdiction than in exercising firmly that which the Constitution and laws confer."¹

But the Supreme Court will adhere to its present rulings unless it is enlarged by the addition of judges who will repudiate the rulings. Enlargement is not desirable, and the remedy is with Congress.

The welfare of the Federal courts themselves demands the non-exercise of jurisdiction over State corporations. There would have been no need of the establishment of the appellate courts, had it not been for the usurped jurisdiction. But if there shall be no abrogation of it, additional Federal courts will be needed.

The Federal courts are of inestimable value to the country so long as they do not overstep their ordained limits. The highest court is the guardian of the Constitution; but here, as in some other well-known instances, the Constitution "is wounded in the house of its friends."

The jurisdiction of the State courts embraces all persons and things the subjects of judicial cognizance, except such as by the express terms of the Constitution and an Act of Congress are placed within the exclusive jurisdiction of the courts of the United States.

"To the decision of an underlying question of constitutional law no . . . finality attaches. *To endure, it must be right.* . . . An Act of the Legislature at variance with the Constitution is pronounced void; an opinion of the Supreme Court is equally so."²

The debates in the State conventions called to adopt the Constitution show that the principal objection to it concerned the Federal judicial power, as being too indefinite; and it was argued that the State judiciaries would be interfered with. So it has proved in respect to the State courts being deprived of their exclusive jurisdiction over corporations of the States as parties to suits.

Alfred Russell.

¹ *Ex parte McCordle*, 7 Wall. 515.

² Bancroft, Works, iv. 349.

LAND TRANSFER.—A REPLY TO CRITICISMS OF THE TORRENS SYSTEM.

I HAVE been asked to "close for the plaintiff" in the series of articles in this REVIEW relating to land transfer, being first, the indictment, so to speak, of our present system, in "Record Title to Land," by H. W. Chaplin, in the number for January, 1893; second, "Registration of Title to Land," by Joseph H. Beale, in the February number; and third, "Land Transfer," by F. V. Balch, in the March number.

I have undertaken the task with diffidence, being conscious that, owing to the pressure of professional work, I have not been able to give to the subject as much study and thought as it deserves.

My knowledge of our system, and of its difficulties and defects, comes from actual experience; such knowledge as I have of the Torrens System comes only from reading and reflection. The latter certainly has the appearance of being far superior to our method in securing ease and certainty in land transfer. I believe that it can be adapted to our circumstances; but I should have more confidence in that belief if I had seen the Torrens System in actual operation in some of the places where it prevails.

The subject presents itself in a general way to me as follows: Lawyers and conveyancers here are daily examining and passing titles; and their clients, relying on their assurance that the titles are satisfactory, are investing money in purchasing lands and erecting buildings, and in making loans on such, to the amount in the aggregate of millions of dollars every year. In an experience of a little more than twenty years in the city of Boston and its vicinity, I cannot now recall an instance where one who has paid his money on the faith of a careful examination of the title has lost it, except in the rare cases of forgery. Why not, then, let well enough alone, it may be said. Is it "well enough"? That is just the question. What is the system under which we are making examinations and obtaining these results? The State, on the theory that it is for the public interest that transfers of land shall be open and notorious, has established the method of recording deeds

and instruments affecting title to real estate, and provided a place for recording them. Of course the idea of providing a public registry is to enable any one to ascertain the title to estates in land by examining the records of deeds. Yet that is not possible, for the State makes no suitable provision for preserving in the same place, so that they can be easily ascertained, a record of facts upon which title depends; such as actual possession by the grantors, the delivery of deeds, the genuineness of signatures, the due authority of persons who take acknowledgments, — purporting to be officers and magistrates, — heirship, capacity to contract, marriage, and divorce. It permits title to depend upon records and proceedings outside of the registry of deeds, such as of the ordinary civil courts and of courts of probate and insolvency; the records and proceedings of various public officers, such as of boards of aldermen and selectmen, street commissioners, a board of survey, and boards of health, such officers having power to take land or create liens for public improvements, such as streets, sewers, sidewalks, edgestones, and drainage of lands; and the records and proceedings of quasi-public corporations, such as railroad and water companies, to which it delegates the power of eminent domain. Then, too, the exceptions to the statutes of limitation may render necessary in some cases a possession of more than sixty years to cut off possible adverse rights, though the period in ordinary cases is twenty years. I do not give these as a complete summary of all the data that it may be necessary to look for and investigate in examining a title, but as some of the most prominent. Nor do all these circumstances occur in every title that is examined; but the possibility that there may be in these outside records and proceedings something affecting a title, throws a doubt upon every title, and makes it necessary to do much work which afterward is found to be needless.

And last, but not least, the indexes to the record of deeds themselves are incomplete and insufficient, and much work has to be done in the registry itself to ascertain the instruments which affect a particular title. It is therefore a familiar experience with lawyers and conveyancers that a large part of the work done in examining a title is found to be needless, yet it cannot be known to be needless until it has been done.

And even with the most thorough examination, we are obliged to assume the existence of these facts outside of the records, and

those who invest in lands are obliged to take some risks. Hence some uncertainty of titles, which is chiefly, however, a matter of apprehension. But the more serious evils which result from our system are the delays and expense which attend transfer of land. The indirect result of loss of opportunities for employment to those engaged in building operations seems to me a worse effect of the present system upon the interests of the public than the direct loss which can be charged to such delays and expense.

The question of the transfer of land is a matter of vital public concern. It is not a question affecting solely the comparatively small minority who hold the titles to real estate; it is one which affects the interests and life of every member of the community, for the use of land is essential to life. By our very constitution we are land animals; our bodies are composed of the substances which come from it, and which can only be obtained from land by labor applied upon or to it. The natural right to life implies the right to obtain the things which support life. The highest right which a man can have is to himself, to the fruits of his own labor. To secure to a man his right to life requires that he should have land to use; to secure to him the fruits of his own labor requires that he should have a privilege of exclusive occupation of it.

Since the State exists to secure to men the enjoyment of their natural rights (see preamble to the Constitution of Massachusetts), it follows that it is the first duty of the State to make it easy for men to acquire land, and to make them secure in the possession of it. If our laws which regulate the holding and transfer of estates in land do not bring about these results, then they ought to be changed as far as may be necessary to do so. It seems to me fair to say, first, that they constitute legal obstacles to the easy acquisition of land; second, — as to security of titles under our system, — since the State leaves it as a matter of private concern to examine titles, an examination, however carefully made, binds no one. Upon every transaction, the purchaser or mortgagee can insist upon a fresh examination. A man cannot be said to be fully secure in his title when no one is bound to admit that he has such.

But, on the other hand, it is the distinguishing mark of the Torrens System that a man who has had his title registered, and obtained a certificate, has a title which cannot be questioned. It seems to me that this feature attaches to the certificate, not

because the title proceeds from the government, or is guaranteed by it, but for the same reason that a decree of court binds parties and privies. Whatever appellation may be given to the public officer who issues the certificate, he in fact exercises a judicial function. The proceedings upon the application for registration of a title are judicial. Particular notice is given to every one who may appear to have a special adverse interest, and general notice to all the world, who are thus made parties. If after a proper interval no one makes adverse claim, the certificate is issued, just as a plaintiff gets judgment when the defendant defaults.

Again, as to the assurance fund. The providing of that is not insurance of the titles by the government; the latter is a mere stakeholder. That fund being obtained by levying a small charge upon those whose titles are registered, there is, in fact, mutual insurance by them. The advantage of having one's title registered and made indefeasible is thought to be sufficient to justify a small charge to provide a fund for compensation in the very rare cases where, under the operation of the Torrens System, one who has some substantial right is cut off without fault on his part, or where some person may become the victim of fraud or forgery. To refer such a victim to an assurance fund for compensation seems to be an improvement upon our system, under which he loses the title which he thought he had acquired, and has no practical redress to recover the money that he has paid.

The object of the Torrens System is not to enable persons who have doubtful titles to get indefeasible certificates of title, but to enable those who have good titles to estates to have their rights declared and established as against all the world. I believe that the lawyers and conveyancers in Boston and vicinity, who pursue the specialty of real estate law, would testify to the same experience as myself, that the examinations of title made in this community, despite the difficulties under which we labor, are in the vast majority of cases practically correct, and that most of the titles examined, to a very large percentage of all, are practically good. That being the case, what harm can be done to any one by giving to the results of these examinations, after proper proceedings and notice, the binding force of a judicial decree?

Then, again, registration of title is purely voluntary. If the new system should be established and exist by the side of the present, at first, certainly, the fact that a man did not get his title regis-

tered would not justify an inference that his title was doubtful. Only, it seems to me, when registration of title had been found so beneficial and become so popular that the vast majority of titles were registered, would any inference be drawn that a title not registered was doubtful.

Mr. Balch, in his article,¹ suggests some drawbacks of the Torrens System, and many points in it which seem to him weak or questionable. Among the drawbacks, he mentions "a great establishment permanently saddled on the public treasury, and a rigid system of officialism and red tape in absolute control of private transactions in land;" and, again, he suggests (though I do not now quote his exact language) that the people might be educated by it in the doctrine that the State is the great perpetual fountain of title. Any system that diminished the sense of personal independence, the tendency to personal initiative, that led the people to look upon public officers or the government as the source from which their wants are to be supplied, I should consider inadvisable. Whether or not the use of the Torrens System of registration of title has that effect upon the community in which it exists could best be learned by studying the character of the people of the Australian colonies, where that system has longest prevailed. Without such study I should not undertake to argue upon that point, either one way or the other.

Mr. Balch also suggests as drawbacks, great expense, and a quickness of transfer inferior in some cases to what can be done under our present system. As to expense, under our system this has two aspects: First, expense to the public—that is, to the taxpayers—of maintaining the officers and clerks, and providing offices and stationery and other office facilities in order to transact the business; and second, the expense to the individuals of the public for having their special matters of business transacted. I have made estimates of such expenses for the County of Suffolk. I cannot give exact figures, because the expenses for the Registry of Deeds and the Probate Court are put in together; but from the figures given I make an estimate of the expense for the Registry of Deeds for the County of Suffolk for the year ending April 30, 1891, for rent of building, lighting, care of building, supplies, indexing, stationery, etc., amounting to a total of about \$35,000. The number of instruments recorded for the year ending September 30,

¹ 6 *Harvard Law Review*, 410.

1891, is 24,322, which I should estimate to represent eight or ten thousand transactions. The fees for recording instruments during that period amounted to \$19,090.11. As to the cost to the public for examination, I can only make an estimate; but taking into consideration the number of transactions where people either examine the title themselves, or do not have a complete examination made, it seems to me that fifteen dollars per title is a fair estimate. This would give a total expense to individuals of the public of between \$120,000 and \$150,000 for examinations, and say \$19,000 for fees for recording.

In an essay on "Transfer of Land by Registration," by Sir Robert Torrens, I find that in Australia fourteen officers and clerks suffice for a business of seventeen thousand transactions annually, costing in salaries and office expenses something under £7,000 per annum, or say \$35,000, — a little more than \$2.00 per transaction. This is to be contrasted with eight or ten thousand transactions in Suffolk County, costing say \$35,000, or \$3.50 per transaction.

I find, also, in the same essay, that in New Zealand the cost of each of 17,422 registration sales and mortgages effected in the year ending June 30, 1879, covering property to the value of £7,585,291, or say \$36,750,000, was only 22s. 9d. per transaction, or \$5.50, or an aggregate of \$95,821; the corresponding figures for eight or ten thousand transactions in Suffolk County being estimated by me as between \$120,000 and \$150,000, or say \$135,000 for examinations, and \$19,000 for fees, or a total of \$154,000.

If the system were started with us, the first expense of getting a title registered would be much larger than transfers of title after registration, and I think would somewhat exceed the expense to the public under our system for examination of title and fees for recording. The gain, of course, would come in lessened expense afterward, and greater facility of transfer.

As to quickness of transfer, the experience of the Australian colonies under the Torrens System appears to show that in the great majority of cases, which is the fair test, transfers are made with very little delay. Many of the weak or questionable points, which Mr. Balch suggests, seem to me to involve questions of administration which one familiar with our real estate law and with real estate transactions would find ways of working out, which would take too much space to answer here in detail, and which could be

answered, if it were essential to answer them now, by one familiar from actual experience with the workings of the Torrens System. Though his article is on the whole unfavorable to the Torrens System, the difficulties that he suggests, coming from one of his wide experience in the practice of real estate law, will prove of great value to any commission that may be appointed to consider the question of introducing the Torrens System here.

I wish, however, to refer expressly to the questions that he makes as to trusts and equitable rights. That feature of the Torrens System by which the certificate deals only with the legal title, disregards equitable estates, and leaves beneficiaries to protect themselves by a notice in the nature of a *caveat*, has never commended itself to me; possibly it might be found upon actual acquaintance with the Australian system that this method of dealing with trusts and equitable estates affords proper security. As to these and all other points in relation to the system, there is no reason why we should slavishly follow it in every particular, or imitate it with Chinese accuracy; but careful study of it by those familiar with our methods would show what features are best adapted to our system and methods of dealing with real estate.

There are many ways in which improvements can be made upon our system, by requiring that acts and proceedings outside of the registry of deeds, — such as, for instance, all which lead to municipal liens for public improvements, and assignments in insolvency and bankruptcy, — shall have no effect upon the title until notice of the proposed liens and the instruments of assignment are filed in the registry of deeds. Attempts have been made heretofore by an organization of lawyers and conveyancers in Boston, of which I am a member, to obtain such reforms; but, in the absence of a decided public sentiment behind, such attempts have met with little success before the Legislature.

The great advantage of the present interest in the Torrens System is that it will create a public sentiment which will bring about the adoption of improvements in our system in the line of requiring some notice or intimation of such proceedings outside of the registry to be filed there before they can have any effect upon titles to real estate.

Finally, I believe that it would be a move of great value to this Commonwealth if a commission of experts should be appointed to study in the places where they are in actual operation, not only

the Torrens System, but the method of registration of possessory certificates, and the method said to be employed in Edinburgh of giving certificates of all the instruments to be found in the records affecting the title to any particular real estate. If, as some experienced real estate brokers believe, and as appears to have been the result in some of the Australian colonies, increased facility in dealing with estates in land will add to their selling value, the increased amount derived in taxes by the State will certainly be one form of gain; but the greatest gain will be in facilitating transactions in land, and making it easier to obtain it for use. Whatever will tend to secure that cannot fail to be of advantage to the public.

James R. Carret.

A DEFECT IN THE MASSACHUSETTS PROBATE SYSTEM.

UNDER the statutes and practice of Massachusetts an administrator of an intestate estate who has collected the personal property and paid the debts of the deceased petitions the probate court having jurisdiction over the estate to make an order directing the distribution of the surplus remaining in his hands among those entitled thereto as next of kin. The petition sets forth that there is a balance to be distributed, and gives the names and residences of all persons known to the administrator who are supposed or claim to be entitled to the estate under the statutes of distribution. Upon the filing of this petition the court orders notice to all persons interested in the estate, by requiring the petitioner to publish a citation at stated intervals before the hearing. At the hearing the court passes upon all questions of law and fact involved in the distribution of the estate.¹ All persons having claims have an opportunity to come in and have them heard and adjudicated. The decree which the court renders determines who are in fact the persons entitled to the estate as next of kin, and orders distribution to them by name.² If no appeal is taken within thirty days from the date of the decree, it becomes final and conclusive, unless it can be shown that the administrator was guilty of fraud or gross error.³ After he has distributed the property in compliance with the decree of distribution, the administrator files an account showing such distribution; upon proof of the truth of the account, the court allows it, and the administrator receives a final discharge. The statute⁴ enacts that "such discharge shall forever

¹ *Loring v. Steinman*, 1 Metcalf, 204; *Muldoon v. Muldoon*, 133 Mass. 111. In *Loring v. Steinman*, Shaw, C. J., said: "The decree of distributions involves the necessity of inquiry into questions of fact; . . . and in deciding these questions of fact the probate court must be governed by those rules of evidence and those presumptions of fact from circumstances which are resorted to by all other tribunals in determining questions of fact." In *Muldoon v. Muldoon*, Field, J., said: "In so far as he holds the proceeds simply as administrator, the question of their distribution is for the determination of the probate court, and any legal questions involved can come before this court on appeal."

² *Loring v. Steinman*, 1 Metcalf, 204.

³ Public Statutes, chap. 156, section 7; *Davis v. Cowdin*, 20 Pick. 510.

⁴ Public Statutes, chap. 144, section 12.

exonerate the party and his sureties from all liability under such decree, unless his account is impeached for fraud or manifest error."

This is in brief the regular method by which an administrator settles an intestate estate. The procedure is simple and complete. The administrator who has acted with ordinary care and in good faith obtains a complete discharge from all liability in respect to the settlement of the estate. If it appears subsequently that the property has been given over to the wrong persons, the administrator, who has acted under a decree of distribution, is protected. He has obeyed an order of a court of competent jurisdiction, and, in the absence of fraud or gross error on his part, he cannot be held responsible if the decree of the court is erroneous in point of fact. In the language of Chief Justice Shaw in the leading case of *Loring v. Steinman*,¹ "the possibility of falling into mistake cannot deter the court from acting, and when all the means of ascertaining the truth are exhausted, cannot prevent the judgment from being at least so far conclusive as to protect all those who are compelled to act under it and to abide by its final adjudication." It is no answer to the administrator's claim of immunity under the decree of distribution to say that the plaintiff never knew of the death of the intestate, nor of the proceedings upon the decree. The distribution of an intestate estate is said to be analogous to a proceeding *in rem*, where the court has jurisdiction over the subject-matter absolutely, and where persons are concerned incidentally only according to their respective rights and interests, and where the court, in determining who are entitled to the property, settles the question definitely in regard to all persons interested, whether they have actual notice of the proceedings or not.² The law may require notice to the next of kin, but it has always been held that constructive notice may be adequate.³

The defect in the Massachusetts probate system which it is the purpose of this article to point out is that it fails to provide any method by which an executor can secure the same protection that a decree of distribution gives to an administrator. In order to see clearly that this defect exists, it will be necessary to examine closely the practice of decrees of distribution in the case of administrators, and to ascertain on what basis it rests.

¹ 1 Metcalf, 204.

² *Loring v. Steinman*, 1 Metcalf, 204; *Pierce v. Prescott*, 128 Mass. 144.

³ *Loring v. Steinman*, 1 Metcalf, 204.

This procedure is not based upon any explicit statutory provision. There is no enactment that an administrator shall obtain a decree of distribution, and there is no express authority given to the probate court to make such a decree. One of the conditions of the bond which an administrator is required by statute to give is that he shall pay to such persons as the court may direct the balance remaining in his hands upon the settlement of his accounts;¹ this, says the court, "contemplates that an administrator is entitled to be protected by a decree of distribution, passed by the probate court, before he can be called upon to divide the balance remaining in his hands among those claiming it as distributees under the statutes."² Upon this implication of the statute prescribing the conditions of the administrator's bond is based the right of the administrator to obtain and the authority of the probate court to make a decree of distribution. No other source of the jurisdiction exercised has been pointed out in any of the reported cases. The practice has existed for many years, however, has been embodied in the rules governing the procedure of probate courts,³ and may be taken to be firmly established in this State.

It is not laid down anywhere that an administrator *shall* obtain a decree of distribution before distributing the estate, except so far as distribution without such a decree might be a breach of his bond. But, on the other hand, it seems to be the only mode in which an administrator can secure protection against the future claim of an unknown heir. It has been suggested, and there is some authority to support it, that the allowance of a final account showing items of distribution is in effect a decree of distribution as to such items, and affords the administrator the same protection. In *Emery v. Batchelder*,⁴ Morton, C. J., said: "The allowance of the final account in which the defendants credited themselves with the residue in their hands as paid to the executors in Maine was in effect an order of the court that such residue should be transmitted to the defendants as principal executors appointed in Maine. If the executors in the two States had been different persons, it is clear that the executors here could not be held accountable in our courts after they had, under an order of the probate court, transmitted the balance in their hands to the executors in Maine. They

¹ Public Statutes, chap. 130, section 2, par. 4.

² Morton, J., in *Cathaway v. Bowles*, 136 Mass. p. 55.

³ Fuller's Massachusetts Probate Law, 136.

⁴ 132 Mass. 452.

then would have fully administered the estate here." On the other hand, the court in the case of *Granger v. Bassett*,¹ speaking through Justice Wells, said: "The probate court had no authority over the distribution of the residuary legacies. The relative rights of the legatees, and other questions affecting such distribution, cannot properly be heard upon the settlement of the executor's account. For the same reason, the executor should not be allowed for their payment in his account, as the effect of such allowance, if any effect can be given to it, would be to prejudice the rights of those who should claim a larger share than had been paid them. The settlement of the account should determine the amount of the residue subject to distribution, but not the rights or shares of those who are entitled."

By thus holding that items of distribution of the balance of the estate are not properly to be included in an account, the court, in effect, decided that the allowance of an account could not amount to a decree of distribution as to such items. But whatever doubt there may have been on the subject is set at rest by the decision of the Supreme Court rendered in January, 1892, in the case of *Defriez v. Coffin*.² In that case, to quote from the opinion, "Without a decree of distribution the administrator paid over to certain persons whom he supposed to be the heirs of the testator the residue of the estate in his hands after payment of debts and various charges and expenses. It turned out about a year after that they were not the heirs, and that the daughter for whose benefit this suit was brought was the sole heir. Shortly after the distribution, and before he knew of the daughter, the administrator presented to the probate court an account, in which he credited himself with the amount paid to the supposed heirs. This was allowed by the probate court. But it is clear that the action of the probate court in allowing it did not legalize the payments to the supposed heirs. Whatever might have been the result had the distribution been made in good faith under the decree of the probate court, the estate is still in his hands, and has not been fully administered." Here is a direct decision that the allowance of an account will not afford the protection of a decree of distribution. The court cites the case of *Granger v. Bassett*, quoted above, and the inference is that the decision is based upon the ground that items of distri-

¹ 98 Mass. 462.

² 155 Mass. 203.

bution are not properly a part of an account. It is true that in *Defriez v. Coffin* it was an administrator with the will annexed who was acting in the settlement of the estate; but the court apparently overlooked this, and treated the case as if it had been an administrator of an intestate estate. If the decision is rested upon the ground stated above, this fact is not material.

Section 14 of chapter 144 of the Public Statutes, as amended by Acts of 1889, chapter 466, section 2, reads as follows:—

“The decree of the court having jurisdiction, allowing an account of an executor, administrator, trustee, or guardian, shall, except in cases of fraudulent concealment or fraudulent misrepresentation on the part of the accountant, be final and conclusive against all persons interested in such account, and legally competent at the date of such decree, . . . and against all other persons who are or may become interested therein, although unborn, unascertained, or legally incompetent to act in their own behalf, if their guardian *ad litem* or next friend has, after having been duly qualified, assented to such account, or been heard thereon.”

It might have been argued that the effect of this statute was to make the allowance of an account equivalent to a decree of distribution. But in so far as items of distribution are concerned, this statute cannot have that effect, because, according to *Defriez v. Coffin* and *Granger v. Bassett*, items of distribution are not properly a part of an account, and the statute cannot be construed as extending to items improperly included in the account allowed.

So far this discussion has dealt only with the administrator of an intestate estate; the defect which seems to the writer to exist in the Massachusetts probate system has reference to an executor, or to an administrator with the will annexed, who is to all intents and purposes in the same position. But in order to approach the question properly, it was necessary to examine briefly the subject of decrees of distribution.¹

It seems to be universally admitted that an executor is not

¹ The term “decree of distribution,” as ordinarily used, applies to the order of the court directing the distribution of an intestate estate among those entitled to a distributive share under the statutes of distribution. But an executor also *distributes* the estate of his testator. The distribution in his case is determined by the will instead of by the statutes, as in the case of the administrator. A decree of distribution applied to an executor would be an order of the court directing the distribution of a testate estate among those entitled to a distributive share under the will of the testator. It is in this sense that the term is used in this article when applied to an executor. Such a decree would have the same effect in protecting the executor, and to the same extent as a similar decree protects an administrator.

entitled to obtain a decree of distribution from the probate court. No statute can be found authorizing the probate court to make such a decree upon the petition of an executor. There is no condition in the executor's bond from which it can be argued that a decree of distribution "is contemplated." While the administrator is bound to pay "to such persons as the court may direct the balance remaining in his hands,"¹ the executor gives bond "to administer according to law and to the will of the testator all his personal estate which may come to his possession."² There is hardly enough ground in this provision from which the court can "contemplate" a decree of distribution. By section 12 of chapter 144 of the Public Statutes it is provided that "when an executor, administrator, guardian, or trustee has paid or delivered over to the persons entitled thereto the money or other property in his hands *as required by a decree of the probate court*, he may perpetuate the evidence thereof by presenting to said court within one year after the decree is made an account of such payments or of the delivery over of such property." It might be suggested that this statute "contemplated" that an executor was to be entitled to obtain the decree mentioned in it. But the Supreme Court has never so decided.³ On the contrary it held in the case of *Cowdin v. Perry*,⁴ that the probate court has no jurisdiction to order the payment of legacies to particular persons. The facts of that case were as follows: A testator bequeathed property to his grandchildren to be equally divided between them, provided that if any grandson should die before arriving at the age of twenty-one years, the share of the one so dying should be divided equally among the surviving ones. The executor paid the share of a grandson who was under twenty-one years of age to his guardian. An account was subsequently filed in which the executor credited himself with the amount so paid to the guardian. This account was allowed by the probate court upon notice given to all the other legatees interested under the will. The minor grandchild died under age, and one of the other grand-

¹ Public Statutes, chapter 130, section 2, paragraph 4.

² Public Statutes, chapter 129, section 5, paragraph 2.

³ There are other statutory provisions which seem to indicate that the framers supposed that an executor could obtain a decree of distribution. For example, Public Statutes, chapter 143, section 12, enacts as follows: "Such suit [upon the bond] may be brought by a person who is next of kin to recover his share of the personal estate after a decree of the probate court ascertaining the amount due to him, if the *executor* or administrator neglects to pay such amount when demanded."

⁴ 11 Pick. 503.

sons brought action against the executor for a share of the legacy paid over to the guardian. It was held that the legacy was contingent upon the grandsons attaining the age of twenty-one years; that it was the duty of the executor to retain it in his hands until the legatee's attainment of that age or his death; and that the settlement of the account containing the credit of the payment of the legacy to the guardian of the minor did not discharge the executor from liability. The case might have been decided without passing upon the power of the probate court to make a decree of distribution on petition of an executor upon the ground that items of distribution of legacies are not properly included in an account. But the court did not take this ground, resting their decision squarely on the want of power in the probate court to order the payment of a legacy, without reference to the question whether or not the allowance of the account amounted to such an order. This is what was said by Chief Justice Shaw, who delivered the opinion:—

“ But the question to whom and at what time a legacy or distributive portion under a will is to be paid by an executor is one of which the probate court has no jurisdiction. Any decree directing the executor to pay or not to pay a legacy to any particular person, whether upon or without notice, would be extra-judicial, and would afford the executor no justification. It would in this respect be similar to a decree directing payment of a debt, and as such a mere nullity.”

The case of *Cowdin v. Perry* was decided in 1831. If the probate court had no jurisdiction to make a decree of distribution in the case of an executor in 1831, no statute since has conferred it. The statutes¹ give the probate court jurisdiction of all matters relating to the estates of deceased persons. It cannot be said that this gives the court jurisdiction to grant a decree of distribution to an executor. A statute of almost exactly the same terms² was in force in 1831, when the case of *Cowdin v. Perry* was decided, and when it was held that to order the payment of legacies was beyond the jurisdiction of the probate court. The statute of 1891,³ which gave the probate court full equity jurisdiction of all matters relating to the administration of the estates of deceased persons, and of wills, conferred upon the court such general chancery powers as had been

¹ Public Statutes, chapter 156, section 2.

² Revised Statutes, chapter 83, section 6.

³ Acts, 1891, chapter 415.

previously vested in our courts of equity.¹ But the granting of decrees of distribution to executors has never been within the jurisdiction of courts of equity. There seems to be a fundamental distinction between the jurisdiction of the probate court over testate and intestate estates. While the distribution of the latter to the next of kin by the administrator is said to be a matter "wholly and peculiarly within the jurisdiction of the probate court, exercising in this respect the jurisdiction of the ecclesiastical courts,"² the distribution of the former by the executor to the legatees is held to be wholly beyond the jurisdiction of the court. This distinction may be the basis for extending the powers of the court by "contemplation" in the case of an administrator, and not in that of an executor.

That an executor has need of the protection which a decree of distribution gives an administrator is of course apparent. In the case of every legacy, specific as well as residuary, to individuals named as well as to a class, the fact of identity of the legatees must be established and decided by some one. If the legacy is to the heirs of the testator, it must be determined who are the heirs, whether children, or brothers and sisters, or more remote relatives. If the bequest is to first-cousins, for instance, it must be settled how many first-cousins there are. If property is given by the will to the eldest son of John Brown, the question Who is the eldest son? must be answered. And when it is simply a specific bequest to John Brown, there is a fact involved which must be determined. It is unnecessary to suggest some of the situations in which an executor, who has acted in good faith and with all possible care, may find that he has paid the legacy to the wrong person; they are too evident. A very good illustration of an extreme case of apparently unavoidable mistake of fact may be found in the reports of the cases of *Defriez v. Coffin* and *Shores v. Hooper*.³ If there

¹ The statute 1883, chapter 223, conferred upon the Superior Court equity jurisdiction. The words of the statute are: "Original and concurrent jurisdiction with the Supreme Judicial Court in all matters in which re'ief or discovery in equity is sought." It was held in *Baldwin v. Abraham*, 140 Mass. 459, that this only conferred such equity jurisdiction as was vested in the Supreme Court as a court of general equity jurisdiction. The extent of the jurisdiction conferred by the statute of 1891 must have the same limits.

² *Loring v. Steinman*, 1 Metcalf, 204.

³ 155 Mass. 203; 153 Mass. 228. These two cases arose from a mistake in fact as to who were the heirs of the testator, entitled under his will to the residue of his estate. The testator had been a resident of Nantucket from 1862 until his death in 1884. He was never known by the community nor by his family to have married. His sisters were supposed to be his heirs, and the residuary estate was divided among them. It

is any reason for protecting the administrator from liability arising from mistakes of fact, the same reason exists in the case of an executor.

It remains to be considered whether an executor can obtain the necessary protection in some other way than by a decree of distribution. The usual method in which testate estates have been wound up is by the filing of an executor's final account showing payments of legacies as well as all other expenditures. Upon the allowance of such final account by the probate court the executor has considered his liability at an end. But is it? The cases of *Granger v. Bassett* and *Defriez v. Coffin* have decided that payments of residuary legacies are not proper items of an account, and that an allowance of an account showing such payments will afford no protection to the accountant. To be sure, all persons who sign the account as consenting to it can be estopped from objecting to it thereafter, and the account, including items of distribution, can be properly allowed for this purpose. But this does not cover the real difficulty, — the unexpected appearance of some person unknown to the executor who is entitled to the residuary legacy, and who, *ex hypothesi*, has not consented to the account. The allowance of the account cannot affect him.

If items of payment of residuary legacies have no place in an account, is the same true of payments of specific legacies? What distinction can be drawn? But apart from this, if it is true that the probate court has no jurisdiction to order the payment of a specific legacy, it is clear that the allowance of an account showing such payment cannot protect the executor. The theory upon which exemption from further liability is claimed is that the court, by allowing the account, has decreed that the executor has paid the right amount to the right person. But such a decree in the case of a specific as well as residuary legacy, according to the opinion of the court in *Cowdin v. Perry*, would be beyond the jurisdiction of the probate court. As was said by Chief Justice Shaw in

was discovered subsequently that he had been married in Alabama in 1860, and had had a child, a daughter, born in 1861. He had deserted his wife and child in 1861, taking with him what little property his wife had. The wife had moved to Tennessee, where she had died soon after, in utter poverty, leaving the child dependent on the charity of neighbors. The daughter was found among the moonshiners of the Tennessee mountains in 1888. These facts were proved before the court, and the daughter was declared entitled to the property, which had been given over to the sisters. The story of this case, as it appears in the depositions of the witnesses, presents a romance which can hardly be surpassed in fiction.

that case, "the object of such accounting by the executor before the judge is to show that he has paid according to his charges; and upon producing proof of the fact of payment, such charge is allowed. But whether such payment is rightful is a question for which the executor himself stands responsible."¹ The section of chapter 144 of the Public Statutes in regard to the allowance of accounts has been referred to above,² in considering the effect of the allowance of administrator's accounts. What was said in that connection is equally applicable to the case of an executor. If the statute does not operate to make the allowance of an administrator's account final and conclusive as to the fact of payment of distributive shares to the proper persons, it cannot have that effect upon the allowance of an executor's account.

If the allowance of an account cannot protect an executor who has paid a specific or residuary legacy to the wrong person, is there any other method by which the desired result can be attained? It may be suggested that the executor can refuse to pay the legacy to the supposed proper legatee until the latter brings action and establishes the fact before a jury that he is entitled to the legacy. But if the executor pursues this course simply for the purpose of protecting himself, and not from any real doubt as to the rightfulness of the plaintiff's claim to the legacy, it may fail to afford him any security. If the plaintiff recovers a judgment he gets a separate judgment for costs against the executor personally.³ Whether the executor can reimburse himself from the estate will depend upon the decision of the judge of probate as to the propriety of the suit. And, further, if the real legatee should turn up subsequently, and bring action for the legacy, the executor would have no defence. The action to recover a legacy is an action of contract.⁴ What the plaintiff obtains, if he is successful, is a judgment at law. The court of law cannot make a decree ordering the payment of the legacy. After judgment the executor does not pay the legacy under a decree of the court, but the plaintiff satisfies his judgment out of the estate of the testator. The fact that one jury found the first plaintiff entitled could not prevent a second jury from finding in favor of the second plaintiff. Only the parties to the first suit would be concluded by the verdict and judgment. If

¹ 11 Pick. 503.

² *Ante*, page 36.

³ Public Statutes, chapter 166, sections 6 and 7; *Perkins v. Fellows*, 136 Mass. 294.

⁴ Public Statutes, chapter 136, section 19.

at the time of the second suit the executor had no assets of the testator in his hands, the plaintiff's judgment for the legacy running against the executor in his official capacity would be of little value; but the executor would have to pay the costs of the second suit out of his own pocket, and would find considerable difficulty in reimbursing himself. And in addition to that, the finding of the second jury would prove that the executor had violated his bond, and if the plaintiff could obtain the consent of the judge of probate,¹ the bond might be enforced against the executor. Whether or not the judge of probate would allow a suit upon the bond might depend upon the character of the first suit for the legacy. It will be seen from this very brief and superficial discussion that the executor will come very far from securing the necessary protection by pursuing the method suggested.

If two or more persons claimed the same legacy, it would be open to the executor to file a bill of interpleader, and have the court decide which of the two was entitled. But this would not prevent a third person from proving subsequently that he, and neither of the other two, was the legatee named in the will; he would not have been a party to the interpleader suit, and would not have been bound by the decree. A bill of interpleader is within the equity jurisdiction of the court, and a court of equity has the power in some cases to bind by its decree persons named as parties who are out of the jurisdiction. When the subject-matter is within the jurisdiction, and there are other parties before the court, so that the cause can be decided on its merits, and an effectual decree made, the court will proceed, and the rights and interests of the absent parties who have been given constructive notice in compliance with the order of the court, will be bound and concluded by the decree.² But the court of equity, having the subject-matter within its jurisdiction, could not make a decree *in rem* binding all the world. Its decree would only settle the rights of those parties who were named as such, whether they appeared or not. It could not bind parties unknown who are not named, and to whom no notice, actual or constructive, is given. A bill of interpleader would, then, secure no greater protection to the executor than would an action at law. On doubtful questions of law the executor may maintain a bill for instructions; but this will not decide questions of fact, nor bind unknown heirs.

¹ Public Statutes, chapter 143, sections 10-13; *Newcomb v. Williams*, 9 Metcalf, 525.

² *Spurr v. Scoville*, 3 Cush. 578.

The conclusion reached by this investigation is that our probate system provides no method by which an executor in distributing the estate of his testator can protect himself from liability to unknown legatees. It is unnecessary to consider what means are open to an executor to shift the loss after it has fallen. The purpose of this article has been to show simply that the liability cannot be escaped. It would not be a difficult matter to show that whatever remedies the executor may have to shift the burden fails to give him adequate protection. The fact that the executor must shoulder the liability seems to be a defect in our probate system, which is not remedied by the fact that there is a possibility that the ultimate loss may be transferred to another. There is no reason why an executor should be forced to assume this extreme liability. As the law stands, he has practically the responsibility of an insurer. He must find the person entitled at his peril. Good faith and the highest possible degree of care are no defence if the legacy has been paid to the wrong person. His liability is of the exceptionally strict class to which belongs that of common carriers and innkeepers. The situation does not call for any such liability. There is no reason why an executor should be in any different position in this respect than an administrator; good faith and due care are all that reasonably can be required of him. No testator could conscientiously demand such responsibility on the part of the man whom he has chosen to distribute his estate. The present situation seems the result of oversight, and not of intention. Few executors have realized what the extent of their liability has been. Thousands of final accounts have been rendered and allowed, and have been supposed to terminate the liability of the executor. But if the conclusions of this article are correct, the liability will run on forever, not terminated even by a Statute of Limitations.¹ Until the Legislature steps in and remedies this defect, it may be said that once an executor, always an executor.

Oliver Prescott, Jr.

¹ "Is this right of action [to recover a legacy] lost by delay in bringing the same? Clearly not by the general statutes limiting the period for bringing actions, as legacies are not within them, they being held to partake so far of the nature of a trust, or demand of an equitable character, as not to be embraced therein." — DEWEY, J., in *Brooks v. Lynde*, 7 Allen, 64.

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DEDICATION OF REALTY — NATURE OF DEDICATOR'S ACT. — The recent case in Minnesota of *Flaten v. Moorhead*, 53 N. W. Rep. 807, raises a question of dedication, without laying to rest the much-disturbed spirit in dedication, — the legal fee. A railroad had deeded land to defendant city by a warranty deed, with this qualifying clause: "Said tract of land, hereby conveyed, to be forever held and used as a public park." The defendant city was about to build upon the land so conveyed a prison. One of the public apparently sues for an injunction, which the court grants, saying, with perfect propriety, that it was not necessary to then determine whether the grant was of a mere easement, or an estate upon condition, or estate in trust. Now, if the fee ever passes out of the owner in dedication, it would seem that it must here, for there is a warranty deed outright to the city, a grantee capable of taking even an out-and-out gift, and it would seem that the dedicator had parted with the fee to trustees.

First, what does the dedicator part with; what rights do the public win? The better view is that he does not pass the fee. *St. Mary, Newington v. Jacobs*, L. R. 7 Q. B. 53.

Even in the principal case the fee does not pass. If it did, it would be upon trust, and a *bona fide* purchaser might acquire the whole estate. But this would be contrary to the spirit of the entire doctrine of dedication, under which the public's right can never be taken from them. *New Orleans v. United States*, 10 Pet. 734. The better view is that the public acquire rights in another's land in the nature of an easement.

Then how does the dedicator part with these rights? The magic of dedication seems particularly effective here, for this right in land can be granted by parol (*Barclay v. Howell's Lessee*, 6 Pet. 498); can be granted to an innominate grantee, — the unincorporated public (*New Orleans v. United States*, 10 Pet. 662); and can be acquired by use for a time less than the period of prescription (*Noyes v. Ward*, 19 Conn. 250).

Thus the dedicator's act is not essentially a legal grant. He may work

a dedication without the necessities of a common law grant. It is rather a declaration of his, which he is not allowed to deny, that he shall be indictable at the hands of whom it may concern.

In this light, dedication seems unilateral; yet, since some form of acceptance by the public is necessary to make the dedicator's act irrevocable it is not entirely unilateral.

LIABILITY OF CORPORATIONS TO EXEMPLARY DAMAGES FOR THE TORTS OF THEIR AGENTS. — One of the worst abuses in the working of the rule as to exemplary damages has received a salutary check in a recent decision of the Supreme Court of the United States (*Lake Shore & M. S. Ry. Co. v. Prentice*, 13 S. C. Rep. 261). To many lawyers the justice of punishing a defendant criminally without allowing him a trial in accordance with the criminal law, has never appeared perfectly obvious. The whole principle of "smart money" seems to many an unnecessary and illogical survival of the times when the jury were sole arbiters of the amount of damages as well as of the facts. But whatever the true theory may be, the practice of giving punitive damages in cases of aggravated tort is now in most jurisdictions too firmly established to be overturned. The essence and justification of the practice is in the convenient punishment which it inflicts upon flagrant wrongdoers. Compensation is all that the plaintiff is ever entitled to ask; but it may not be inexpedient to make the defendant "smart" for his wanton or oppressive conduct; and if the plaintiff reaps the benefit of this punishment, — why, so much the better for him. Now, as the whole object of the rule is the punishment of the defendant, it is altogether clear that the rule should be applied only in cases where the defendant has himself been guilty of some outrageous act. Accordingly, it has long been the better opinion that a master is not liable in exemplary damages for injuries resulting from the acts of his servant, unless the criminal intent, which alone warrants the imposition of such damages, can be brought home specifically to him (*The Amiable Nancy*, 3 Wheat. 546). The plaintiff must be fully compensated; but there is no reason in law or in the nature of things why the master should be punished like a criminal for acts which he did not do and could not prevent. It would seem naturally to follow that corporations are not to be held liable in punitive damages for the oppressive conduct of servants whom they have not been negligent in choosing, and whose acts they neither authorized nor approved. Nevertheless, many courts, which do not require the individual principal to pay more than compensation for the injurious acts of his servant, do hold the shareholders of corporations, and especially of railway corporations, liable to be fined in the discretion of a jury for evil designs which they never entertained. The reason for this anomalous extension of an anomalous rule appears to be a lively distrust of corporations in general, and of railway corporations in particular. We are told in a leading case on this subject (*Goddard v. G. T. Ry. Co.*, 57 Me. 202) that "all attempts to distinguish between the guilt of the servant and the guilt of the corporation, or the malice of the servant and the malice of the corporation, is sheer nonsense, and only tends to confuse the mind and confound the judgment." By way of complete and crushing answer to the objection that this policy results in punishing the innocent for the sins of the guilty, it is said that "if those who are in the habit of think-

ing that it is a terrible hardship to punish an innocent corporation for the wickedness of its agents and servants, will for a moment reflect upon the absurdity of their own thoughts, their anxiety will be cured. Careful engineers can be selected who will not run their trains into open draws; and careful baggage-men can be secured who will not handle and smash trunks and bandboxes, as is now the universal custom; and conductors and brakemen can be had who will not assault and insult passengers; and if the courts will only let the verdicts of upright and intelligent juries alone, and let the doctrine of exemplary damages have its legitimate influence, we predict these great and growing evils will be very much lessened, if not entirely cured. There is but one vulnerable point about these existences called corporations, — and that is, the pocket of the moneyed power that is concealed behind them; and if that is reached, they will wince." This learned judge, who would put an end to all the evils of mankind with the noble weapon of exemplary damages, is conclusively answered in the careful and convincing opinion of Mr. Justice Gray in the principal case. A passenger on the Lake Shore Road, who had been inexcusably maltreated, but not physically injured, by the conductor of the train on which he was travelling, brought an action against the corporation in the Circuit Court, claiming exemplary damages. There was no pretence that the conductor was known to his employers as an unsuitable person for his position, or that they countenanced or approved his acts in any way. The jury were nevertheless charged that they might give punitive damages, and the plaintiff obtained the enormous verdict of \$10,000. This sum was subsequently reduced to \$6,000, on the plaintiff's motion. The defendant then sued out its writ of error. Mr. Justice Gray reviews the authorities with much care, pointing out that exemplary damages are given, "not by way of compensation to the sufferer, but by way of punishment to the offender," and that therefore an individual principal cannot be held liable for exemplary damages "merely by reason of wanton, oppressive, and malicious intent on the part of the agent." "The rule," he continues, "has the same application to corporations as to individuals. This court has often, in cases of this class, as well as in other cases, affirmed the doctrine that for acts done by the agents of a corporation, in the course of its business and of their employment, the corporation is responsible in the same manner and to the same extent as an individual is responsible under similar circumstances." This position seems impregnable.

LIBELLOUS MATTER. — Another decision has been added to the already perplexing mass of authority on defamation. In *Buckstaff v. Viall*, 54 N. W. Rep. 111, the complaint alleges that the defendant, who was the sole owner and publisher of the "Oshkosh Times," maliciously published an editorial on the plaintiff, who was State senator from the senatorial district of which Oshkosh was the natural centre, to the following effect. He is addressed as "Divine Senator," "Mighty Being," "Omnipotence," — appellations which on their face might impute divinity and its consequent virtues, but which also "may mean," as the court says, "that he is vain, self-conceited, pompous, self-aggrandizing, and assumes a despotic and god-like character above his constituents and all other men." Further, he is called "Senator Bucksriff," "His Majesty Bucksriff," "Dearly beloved Bucksriff," and this recurring epithet of "Bucksriff," while the plaintiff's name was Buckstaff, seems to be the gravamen of the charge.

A demurrer to this complaint, on the ground that it did not state a cause of action, was overruled; and from this ruling the defendant appeals. The chief grounds of the demurrer are two: (1) That the article is not libellous; (2) That it is privileged.

As to (1) the court, in referring to the epithet of "Bucksniff," very properly says: "It is a nickname which is a name of reproach, and an opprobrious appellation, and is in the similitude of 'Pecksniff,' one of the familiar and most contemptible characters in Dickens;" and holds that this literary allusion and accusation of divinity are *prima facie* libellous. This view is undoubtedly right, both on principle and authority. Even if the charges are somewhat novel, they are ample to subject the plaintiff to one or more of the indignities of "shame, disgrace, hatred, scorn, ridicule, and contempt," to all of which indignities the court declares the charges subjected him.

Point (2) need scarcely concern us; for even if the communication were privileged, and the occasion not overstepped, yet malice, which is here charged, is a sufficient replication to privilege.

RIGHTS OF ACCESS TO UNDERLYING STRATA OF THE EARTH'S SURFACE. — A very pretty question of first impression has been raised in Pennsylvania in the recent case of *Chartiers Block Coal Co. v. Mellon*, 25 Atl. Rep. 597, and on these facts. The defendant landowner granted to the plaintiff by the same form of grant as he would convey the fee of land all the coal under his land, and the mining rights and privileges, reserving no rights in the coal, nor ways to or through the coal. In Pennsylvania this passes to the plaintiff, not a profit, a mere right to go on and take, but the full title to a subterranean estate in land of certain depth, — an estate in land of as high a legal degree as the grantor's remaining fee, which remainder happens in the order of nature to be both above and below his (*Lillibridge v. Coal Co.*, 143 Penn. St. 293; cf. *Eardley v. Granville*, L. R. 3 Ch. Div. 826). This land proves to be in the oil region, and the grantor proceeds to sink wells through the plaintiff's slice of land. Now, is the grantor trespassing on the grantee's land, or must he have this right of access to the lower levels of his fee? For observe, he reserves no such easements. The facts, it will be seen, are almost perfect.

It will be agreed on all hands that he must have this access; the necessities of the case demand it. Then the interesting inquiry is, What kind of a right is it?

It was suggested by the judge below that the right of access was a way of necessity, and in one opinion on the appeal that it was a natural right. The latter said: "I would lay down the broad proposition that the several layers or *strata* composing the earth's crust are by virtue of their order and arrangement subject to reciprocal servitudes; and as these are imposed by the laws of nature, and are indispensable to the preservation and enjoyment of the several layers or *strata* to and from which they are due, the courts should recognize and enforce them;" and "the necessity for access results from the work of nature just as truly as the necessity for support."

Of course this right is allowed by the necessities of the situation, and it is in a certain sense a way, — at least it is a means of access, — and so may be not inaptly called a way of necessity. Moreover, in this case,

and probably in the majority of cases, it will make no difference what it is named, for under either name it will exist. But if way of necessity is examined there appear certain limitations resting on the real nature of its doctrine that could be here ill-applied. There shall, for instance, be but one way of necessity, — a restriction which would be curious to apply to oil-wells. Furthermore, a way of necessity does not always arise where there is no other access (1 Wms. Saunders, 323 *a*), but only where there has been a grant or the equivalent of a grant (Leake, "Uses and Rights of Land," p. 267). Thus, if an inaccessible tenement should be separated by escheat, no way of necessity exists (*Proctor v. Hodgson*, 10 Ex. 824). Such limitations show the nature of way of necessity, — that it is an implied grant of an easement arising between grantor and grantee, since it cannot be considered the transfer of land would have taken place without it. As in other easements of necessity, a man shall not derogate from his grant.

These questions have to do only with the inception, the acquisition of this right, for, once acquired, it is the same in either case, — a right in another's land, an easement. But it is just this point of acquisition that makes the only difference between natural rights and ordinary easements. The right of access in the principal case must exist, not because of any grant implied or real, but for the same reasons that riparian rights and rights of support exist. Like them, it is a natural right, and must be treated as always having existed.

Besides giving the true aspect of the origin of the right, the last view will be applying to new facts a broader principle, and one with more room to accept the new situations.

IN the death of Moses Day Kimball, which occurred in Washington on April 1st, the School has lost one of the most promising of its recent graduates; while those of us who knew him have lost a good and true friend. At the time of his death he was filling the position of private secretary to Justice Gray, of the United States Supreme Court, — a much-prized appointment, given to him on his graduation last June. In the School his exceptional ability was recognized on all sides, and his untiring devotion to his work was the admiration of every one. He was invariably pleasant and courteous to all, kind and self-sacrificing. He would always cheerfully give up a part of his time — so abundantly filled with his own work — to explain to a less able fellow-student some difficult point of law which his own quick and acute mind had easily grasped. He was never so busy that he could not give to others whatever aid they asked of him; and he never gave grudgingly, but kindly, pleasantly, and simply. He did not thrust himself forward, nor make any claims to the place of leader, which was universally accorded him. He was respected by all who came in contact with him, loved and admired by those who had the good fortune to be his intimate friends. All looked forward to a career for him full of honor and usefulness, and it seems peculiarly sad that death should have cut short a life that promised so much.¹

¹ We are indebted for this notice to Oliver Prescott, Jr., a fellow-editor and classmate of Moses Day Kimball. — EDITORS.

RECENT CASES.

ADMIRALTY — JURISDICTION OF STATE COURT — ENFORCING LIEN GIVEN BY STATE. — Pub. St., Mass., c. 192, § 14, gives a lien for repairs furnished a vessel in her home port. Section 17 of same chapter gives the State courts authority to enforce such liens; *held*, that the State courts have jurisdiction to enforce such liens by proceedings *in rem*, notwithstanding Rev. Stat. U. S. § 563, subd. 8, and § 711, subd. 3 (giving the United States District Courts exclusive jurisdiction of "all civil causes of admiralty and maritime jurisdiction, saving to suitor the right of a common law remedy in all cases where the common law is competent to give it") Morton and Knowlton, JJ., *dissent*. *Atlantic Works v. The Glide*, 33 N. E. Rep. 163 (Mass.).

Holmes, J., who gives the opinion of the majority of the court, has previously discussed this question in his note in 3 Kent's Commentaries, 12th ed., 171. He takes the position that the lien is a right of property by itself, distinct from a right to proceedings *in rem*, just as a mortgage is distinct from the foreclosure proceedings given to enforce it. It has been held by the United States courts that a State law creating a lien where there is no parallel lien given by maritime law is valid; and if the State may give the lien, it would be strange if it could not enforce it. If the lien is regarded merely as a remedy on a maritime contract, then the State by its statute would simply be trying to establish a remedy in certain admiralty cases; and as the State has no courts of admiralty, that would really be attempting to impose a new process on a court outside of its power. Morton, J., who gives a dissenting opinion, contends that the lien is merely a remedy for enforcing a maritime contract, and not a distinct right of property, and thus is within the exclusive jurisdiction of the District Courts under the clause above stated. The United States courts enforce such liens on the same principle on which they have enforced liens given by foreign law.

AGENCY — MASTER AND SERVANT — WHAT CONSTITUTES THE RELATIONSHIP. — The defendants, manufacturers of fireworks, contracted with a Fourth of July Committee of the town of A to furnish a \$400 display of fireworks, and to send down a man to take charge of it. The female plaintiff, a spectator at the celebration, was injured by the horizontal discharge of a rocket by a boy of seventeen whom the defendants had sent down with the man contracted for; the boy at the time of the accident being under the control of one of the committee. The plaintiff was nonsuited at the trial. *Held*, affirming the nonsuit, that the contract was for the sale and delivery of personal property, not one requiring the defendants to give a display or exhibition; that the boy who discharged the rocket which struck the plaintiff was not at the time the servant of the defendants, but of the committee. *Wyllie et ux. v. Palmer*, 33 N. E. Rep. 381 (N. Y.).

AGENCY — RAILWAY COMPANY AND CONDUCTOR — AUTHORITY TO ACT IN EMERGENCY. — Action against a railway company to recover for lodging and care furnished a brakeman, injured while making up a train, and carried in an unconscious condition to the plaintiff's house. Soon after, on learning of the accident, the conductor of the train, who was the highest officer of the company present, came to the house, and requested the plaintiff to care for the injured man, and told him that the company would repay him. *Held*, that in such an emergency the conductor had authority to bind the company, whose duty it was to provide the sufferer with shelter and medical attendance. Ross, J., *dissents*. *Toledo St. L. & K. C. R. Co. v. Mylott*, 33 N. E. Rep. 135 (Ind. App. Ct.).

This case goes rather farther than most of the cases which precede it, in allowing an inferior official to bind the company in an emergency. *Quære*, would the brakeman or fireman be held to have this implied power? For a collection of authorities on this point, see Am. and Eng. Encyc. of Law, vol. i. p. 365, note, under the heading "Agency."

AGENCY — UNDISCLOSED PRINCIPAL — AGENT ACTING IN CONTRAVENTION TO HIS SECRET INSTRUCTIONS. — H, proprietor of a beer-house, sold out his business to the defendants, a firm of brewers, who retained H in charge of the business, leaving his name on the sign, and taking out the license in his name. In the terms of the agreement it was expressly stipulated that H should obtain cigars for the house from the defendants. Notwithstanding this, H purchased cigars from the plaintiff, who knew nothing of the transfer of the business, and gave credit to H alone. On discovering that H was not the real owner of the business, plaintiff brought action against the defendants for the value of the goods furnished. *Held*, that the defendants, being the real principals, were liable for all acts of their agent within the authority usually confided to

an agent of that character, notwithstanding secret limitations as between principal and agent. *Watteau v. Fenwick*, [1893] 1 Q. B. 346 (Eng.).

If the case can be supported it must be on the broad ground that one who intrusts the management of his business to another, remaining himself in the background, should be held responsible for the acts of his manager done in the conduct of the business. The court rely on *Edmunds v. Bushell*, L. R. 1 Q. B. 97, which, however, does not go quite the full length of the present case, and seem to have overlooked the case of *Miles v. McIlwraith*, 8 App. Cas. 120, where the court decided that an undisclosed principal was not liable on a contract of his general agents who acted in excess of their authority, because there was no evidence to show that the third party knew of the existence of the agency. For a criticism of the principal case, see 37 *Solicitor's Journal*, 280.

BILLS AND NOTES — LIABILITY OF MAKER — ALTERATION BY FILLING VACANT SPACES. — Defendant made a note, the material part of which was as follows: "I promise to pay to the order of Camp & Ames one hundred dollars at — Value received." After its execution by defendant, this note was altered by inserting the words "or bearer" in a vacant space which defendant had left after the word "Ames," and the words "Bank of Summit, Miss.," after the word "at." There was nothing on the face of the note, as altered, to raise suspicion; and plaintiffs were *bona-fide* purchasers for value. *Held*, that plaintiffs could not recover on this note. *Simmons v. Atkinson & Lampton Co.*, 12 So. Rep. 263 (Miss.).

This is a case of first impression in Mississippi. The authorities on this point are sharply divided. The most satisfactory ground on which to explain the decisions opposed to the principal case is that the maker was negligent in leaving such spaces, and "cannot complain of his own default against a person who was misled by that default, without any fault of his own." *Cleasby, B.*, in *Halifax Union v. Wheelwright*, L. R. 10 Ex. 183, at 192. In view of the stress which the courts have always laid on the desirability of making negotiable paper circulate as freely as possible, it seems eminently proper to hold the maker liable in a case of this sort; and although there is room for difference of opinion as to what sort of space it is negligent to leave vacant, we submit that the Mississippi court and the courts which it follows go too far when they hold that "it cannot be negligence to do that which can injure no one unless some one else shall commit a felony." *Holmes v. Trumper*, 22 Mich. 427, and *Greenfield Bank v. Stowell*, 123 Mass. 196, are in accord with the principal case; *Young v. Grote*, 4 Bing. 253; *Yocum v. Smith*, 63 Ill. 321, are *contra*.

BILLS AND NOTES — TIME OF MATURITY OF A DEMAND NOTE — INTEREST. — A promissory note was given payable on demand, after date, with interest after maturity. *Held*, that interest ran from demand. *Durand and Grant, JJ.*, *dissented*, and maintained that a demand note was due at once, and interest ran from date of the note. They contended that it was illogical to say that a note matured at one time for the Statute of Limitations, and at another time for purposes of drawing interest. *Nye v. King's Estate*, 54 N. W. Rep. 178 (Mich.).

The case seems in accordance with the weight of authority. *Tiedeman on Commercial Paper*, § 310, p. 540, and cases there cited. It is usually held in this country that the Statute of Limitations runs from date of the note, *De Lavallette v. Wendt*, 75 N. Y. 579; and for purposes of negotiation a demand note becomes overdue after a reasonable time from issue. *Ranger v. Cary*, 1 Met. 369; *Poorman v. Mills*, 39 Cal. 345.

CONFLICT OF LAWS — FOREIGN ASSIGNMENT OF PROPERTY WITHIN THE STATE. — The insolvency laws of Idaho forbid preferences, but those of Utah do not. *L.*, in Utah, made an assignment to plaintiff, with preferences, of personal property situated in Idaho. *Held* (reversing the decision of the Territorial Court of Idaho; see 23 Pac. Rep. 922), that Idaho was bound by interstate comity to recognize the assignment as valid, as against the claim of a citizen of Minnesota who attempted to set up the Idaho statute. *Barnett v. Kinney*, 13 Sup. Ct. Rep. 403.

This case is in accord with the language of some recent decisions, but goes farther than the actual point decided in most of them. The assignment here would be universally held bad as against a citizen of Idaho; the rule of comity never prevents a State from protecting its own citizens. It would be held good as against a citizen of Utah; a State usually recognizes the insolvency laws of a sister State as against the citizens of the latter. See *Wharton on Conflict of Laws*, § 371. As to the present case, when the creditor setting up the Idaho statute is a citizen neither of Idaho nor Utah, there is little actual authority. The decision is sensible.

CONSTITUTIONAL LAW — MUNICIPAL IMPROVEMENTS — TAXATION — ASSESSMENT OF BETTERMENTS. — City of Norfolk took under condemnation proceedings for a street

improvement a strip of defendant's land, and paid \$1,200 as compensation both for the land taken and for the damage beyond the benefits received to the residue. Then the city assessed the abutting land for the betterments. *Held*, that under the State Constitution, art. 10, § 1, declaring that "taxation, whether imposed by the State, county, or corporate bodies, shall be equal and uniform," and that "no one species of property shall be taxed higher than any other species of equal value," the assessment was invalid. *City of Norfolk v. Chamberlain*, 16 S. E. Rep. 730.

In an elaborate discussion, the court, on grounds of logic and justice, strongly disapprove of *People v. Mayor &c. of Brooklyn*, 4 N. Y. 419, the leading case allowing, in absence of constitutional restraint, local assessments for public improvements. That case puts the whole burden on the abutters as the beneficiaries, while at the same time it acknowledges there is a public benefit. The main case is rested on the explicit provisions of the Constitution. Several States with similar provisions allow local assessment on the ground that the Constitution only applies to a general tax. *Emery v. San Francisco Gas Co.*, 28 Cal. 345; *Dillon, Munic. Corp.* §§ 752-761.

The case might have been decided on its special facts. The city ordinance was not complied with (pp. 774-8), and the tax was not assessed on any system of proportion among the abutters (p. 731).

CONSTITUTIONAL LAW—RIGHT OF AGENTS OF THE GOVERNMENT TO PLEAD STATUTE OF LIMITATIONS—DOCTRINE OF UNITED STATES V. LEE.—Plaintiff brought ejectment against officers of the United States army for land occupied by them as a military post of the United States. *Held* (Field, J., dissenting), that defendants could plead the Statute of Limitations in virtue of possession by the United States for the statutory period. *Stanley v. Schwalby*, 13 Sup. Ct. Rep. 418.

The decision of this case follows as a practical corollary from the rule of *United States v. Lee*, 106 U. S. 196; but it involves serious technical difficulties. It was there held, with four justices dissenting, that although the United States could not be directly sued without its own consent, yet an action of ejectment would lie against its agents for land of which they had the mere custody. The agents, both there and in the case at bar, had not such possession as on ordinary principles would have rendered them liable to ejectment; they had no estate in the land whatever, and could have pleaded that they were not tenants to the freehold if their principal had been a private person. The object of the decision in *United States v. Lee* was to minimize the injustice of the admitted rule exempting the sovereign from suit. It was not meant, however, to put the United States in a worse position than an ordinary principal; so that the present decision was a necessity. But it is very difficult to explain how a defendant, who claims no title whatever in himself, could support the plea of the Statute of Limitations, as is here permitted. The court admit that in effect it is the United States that sets up the statute, and accordingly also hold (a point on which there is little direct authority) that the sovereign, though not bound by the statute, may plead it. They intimate that this might even be true although no action could have been brought against the sovereign. *Sed quare*; see *Wood on Limitations*, § 53.

CONSTRUCTION OF STATUTE—SUNDAY LAW—SALE OF NEWSPAPERS.—*Held*, that the sale of newspapers on Sunday cannot be justified as a work of "charity" or "necessity" under the Act of April 22, 1794, nor under the provision therein enumerating, as things that may be done, the preparation of food, landing of passengers by watermen, removal of persons with their families, delivery of milk or other necessities. *Commonwealth v. Matthews*, 25 Atl. Rep. 548 (Penn.).

This decision must be regarded as technically correct; but there may well be a feeling that the Pennsylvania court would not have been altogether unwarranted in declaring Sunday newspapers to be "works of necessity."

CONTRACT—OFFER OF REWARD.—The proprietors of a patent medicine offered a reward of £100 to any one who should contract the influenza after using the medicine according to directions. *Held*, that there was a valid contract between the company and a person who fulfilled all the conditions, with knowledge of the offer. *Carlill v. The Carbolic Smoke Ball Co.*, [1893] 1 Q. B. D. 256; 6 Harv. Law. Rev. 157. This affirms the decision of *Hawkins, J.*, in (1892), 2 Q. B. 484.

It is a pity that the court did not deal more thoroughly with the question as to whether there was a request on the part of the company, as this is really the point on which the decision hinges.

CONTRACTS—CONTINUING OFFER—RIGHT TO REVOKE.—Plaintiff ordered of defendant all the wheels that he should need during the season. The latter accepted this, and filled certain orders at the specified prices, but refused to fill other orders. *Held*, that the acceptance of the order was merely an offer to furnish the goods, but,

after this had been acted upon by plaintiff, and defendant had had the benefit of a sale, the entire contract was binding. *Cooper et al. v. Lansing Wheel Co.*, 54 N. W. Rep. 39 (Mich.).

It is submitted that this decision goes too far. There is a continuing offer and, when an order is sent in, the offer is accepted *pro tanto*; so defendant should have been compelled to furnish the goods ordered before notice of revocation. The right to revoke should not be taken away, as the offer has never been accepted *in toto*. *Railway v. Withans*, L. R. 9 C. P. 16, is cited as upholding the court's view; but it only decides that by an order the offer is accepted to the extent of the order.

CONTRACTS—CORPORATIONS.—*Held*, that when extra work is done by a building contractor for a corporation, with knowledge of a majority of the directors, and upon the assurance of one of them that the company will pay for it, and upon the after assurance that there had been a meeting at which the company had agreed to pay, this is sufficient, regardless of whether the director had any authority to make such assurance, or even whether he told the truth about the meeting, to raise an obligation on the part of the company to pay for such work as it receives the benefit of. *Tryon v. White & Corbin Co.*, 25 Atl. Rep. 713 (Conn.).

The action here was for work and materials, and there can be no doubt that on the principles of quasi-contract the decision is correct. The plaintiff acted in good faith, and not as a volunteer or officious stranger.

CONTRACTS—PUBLIC POLICY—PROCURING TESTIMONY.—A debtor sold all his property, and left the country. Defendants, who were creditors, offered plaintiff one quarter of all they recovered, if he would procure affidavits and testimony from the debtor and two other witnesses that no consideration was paid for the property, and that the purchaser knew of debtor's insolvency. *Held*, such an agreement is illegal, as it tends to subornation of perjury, and is against public policy. *Goodrich v. Tenney*, 33 N. E. Rep. 44 (Ill.).

For similar decisions declaring contracts to procure testimony void, as against public policy, see 67 Ill. 256; 48 Cal. 369.

CRIMINAL LAW—CONSPIRACY—RESTRAINT OF TRADE.—Retail coal-dealers formed an association to fix prices of coal in Lockport. According to their by-laws, a vote of the members determined prices. These actually adopted were reasonable. One dealer in Lockport would not join the association, whereupon the organization gave notice to the wholesale dealers, who then refused to sell him coal. *Held*, the members of the association were guilty of a conspiracy to do acts injurious to trade. *People v. Sheldon*, 21 N. Y. Sup. 857.

By an early New York statute a conspiracy "to commit any act injurious . . . to trade or commerce" is a misdemeanor. The court speak as though the attempt to fix prices were the offence. By such a construction of the statute, mere contracts in restraint of trade, instead of being simply unenforceable, would furnish grounds for an indictment, and a most radical doctrine would take the place of the common-law rule. *Mogul S. S. Co. v. McGregor*, (1891) App. Cas. 45-47. But if the statute be merely declaratory of the common law, the combination to fix prices at which members would sell coal would not be illegal, but the attempt to prevent the wholesale dealers from selling to any except members would constitute a conspiracy. Erle on Trades Unions, pp. 35-42; Bishop, Crim. L., § 233. In *Com. v. Hunt*, 4 Met. 111, Chief-Justice Shaw in an able opinion seems to reach an opposite result. It is submitted, however, that Chief-Justice Savage, in *People v. Fisher*, 24 Wend. 9, which the principal case follows, states the sound doctrine: "If the defendants cannot make coarse boots for less than one dollar per pair, let them refuse to do so; but let them not, directly or indirectly, undertake to say that others shall not do the work for less."

CRIMINAL LAW—INTERSTATE EXTRADITION—POWER TO TRY FOR DIFFERENT CRIME.—Persons brought into one State from another by extradition proceedings, to answer a charge of one crime, may be tried on an indictment for a different crime. *Commonwealth v. Wright*, 33 N. E. Rep. 82 (Mass.).

* This same point has been recently decided in the same way by the Georgia court, in *Lascelles v. State*, 16 So. E. Rep. 945. Both the Massachusetts court and the Georgia court cite *People v. Cross*, 32 N. E. Rep. 246 (N. Y.), and treat the question as the New York court treated it. See 6 Harv. Law Rev. 320.

CRIMINAL LAW—POWER OF THE JURY.—The jury are not the judges of the law applicable to a criminal case, but must accept that laid down by the court. *State v. Burfee*, 25 Atl. Rep. 964 (Vt.).

The court had to overrule an earlier case. *State v. Croteau*, 23 Vt. 14, to adopt this commonly accepted doctrine. 3 Greenleaf, Ev. § 179.

EQUITY — COVENANT BY LESSOR — SPECIFIC PERFORMANCE — INJUNCTION. —

The defendant lessors covenanted with the plaintiff lessee of a flat to provide a porter resident in the building, to be constantly in attendance in person or by some trustworthy assistant. The lessors appointed a cook to reside on the premises, and permitted him to carry on his business as cook at another place, and delegate his duties as porter to boys and charwomen. The plaintiff prayed for (1) an injunction to restrain defendant from employing as a porter any person who was not resident and constantly in attendance, and able and willing to act as the servant of the plaintiff according to the agreement; (2) specific performance of the agreement to appoint a resident porter according to the terms of the covenant; (3) damages. *Held*, by the Court of Appeal (reversing the decision of A. L. Smith, J., who granted an injunction and a decree of specific performance in the terms of the plaintiff's prayer), that specific performance could not be decreed because the execution of such a contract would require a constant superintendence by the court; and that what the court could not do affirmatively and directly by a decree it could not do negatively and indirectly by injunction. *Held* further by Kay, L. J., that damages were an adequate remedy. *Ryan v. Mutual Tontine Westminster Chambers Association*, [1893] 1 Ch. 116 (Eng.).

A report of this case as it was decided by A. L. Smith, J., and a criticism of the decision in accordance with the conclusion here arrived at, will be found among the Recent Cases in 6 Harv. Law Rev. p. 157.

INSURANCE — CONDITIONS OF FORFEITURE. — By the terms of a fire insurance policy taken out by a mortgagor, it was to become void "immediately upon the passing or entry of a decree of foreclosure or upon a sale under a deed of trust." The mortgage gave a power of sale to B as attorney for the mortgagees, and he sold the property before the fire. The proceeding was, however, in law only an unaccepted proposition for a purchase, and no title passed to the vendees till it was confirmed by the court after the fire. *Held*, the policy was not forfeited. The conditions were meant to provide that the insurance should cease to be effective only when the title of the insured came to an end. *Hanover Ins. Co. v. Brown*, 25 M. E. Rep. 989 (Md.).

INSURANCE — SURRENDER OF POLICY UNDER MISTAKE OF FACT. — A held an insurance policy for \$6,000 on B's life. To avoid paying the large premiums, he surrendered the policy, and in return got a paid-up one for \$2,500. At the time, B was really dead, though A and the company supposed him alive. *Held*, as both parties acted under a mistake of fact, equity will reinstate the \$6,000 policy upon surrender of the paid-up one. *Riegel v. Am. Life Ins. Co.*, 25 Atl. Rep. 1070 (Pa.).

The court say, "In many of the cases, prominence is given to failure of consideration resulting from mutual mistake or ignorance of material facts; but entire failure of consideration is not an essential ingredient in any case." This is certainly true. In the case of money paid where the consideration has failed, money paid under a mistake of fact, and in a case like the present, the defendant has something which in justice belongs to the plaintiff. Sometimes the plaintiff may be made good by an action at law for money had and received, and sometimes, as in the principal case, an obligation will have to be reinstated in a court of chancery. But always the remedy is purely equitable in spirit, and the object is restitution.

JURISDICTION — ILLEGAL SENTENCE — HABEAS CORPUS. — A defendant in a criminal case was convicted of a crime, the maximum punishment for which was two years' imprisonment. The judge by mistake sentenced defendant to five years' imprisonment. *Held*, that the judgment was not merely erroneous, but void, and a writ of *habeas corpus* should be granted. *Ex parte Cox*, 32 Pac. Rep. 197 (Idaho).

The court say that jurisdiction includes, not only power over the person and subject-matter, but also authority to render the particular judgment given; and so here, as the sentence was unauthorized, and the judgment was entire and indivisible, the jurisdiction completely failed. This appears to be the more modern, though not universal, doctrine. See Black, Judgments, § 258.

MORTGAGE — COMPENSATION OF MORTGAGEE FOR SERVICES PERFORMED AS SOLICITOR IN FORECLOSURE SUIT AND SALE. — *Held*, in analogy to the cases of solicitor-trustees, that a mortgagee who is also a solicitor cannot claim compensation for legal services performed by him in the foreclosure of the mortgage, but only for his actual costs out of pocket. *Held*, however, that if the services are performed by a firm of which the mortgagee is partner, the other partner, who is not a mortgagee, is entitled to a fractional part of the sum found to be the value of the services, in the ratio in which he shares in the firm profits. *In re Donaldson* 27 Ch. D. 544; and *Cradock v. Piper*, 1 Mac. & G. 664, disapproved. *In re Doody*; *Fisher v. Doody*; *Hibbert v. Lloyd*, [1893] 1 Ch. 129 (Eng.).

PUBLIC OFFICER — PAYMENT OF SALARY TO DE FACTO OFFICER — DISCHARGE OF OBLIGATION TO OFFICER DE JURE. — A and B were opposing candidates for county treasurer. The return of the board of canvassers was in favor of A. B contested the election, and, the county court deciding in his favor, entered into and discharged the duties of the office. A appealed to the district court; and after nearly twenty-two months the decision of the county court was reversed, and A took possession of the office. At the end of A's term he refused to pay over to his successor a sum of money which he claimed was due him as salary while the office was held by B, and which the county had paid to B while he was in possession of the office. Upon an application for a writ of mandamus to compel A to pay over the money, *held* that the county discharged its liability by paying the salary to B, the *de facto* officer, and A had no claim upon the county for the money. *State ex rel. Greeley County v. Milne*, 54 N. W. Rep. 521.

The case is in accordance with the weight of authority, although it may well be questioned if it is right in principle. See, *contra*, *Andrews v. Portland*, 74 Me. 484; s. c. 10 Am. St. Rep. 280, at 284, where the cases are collected and discussed in a note. Cases are also collected in 19 Am. & Eng. Ency. of Law, 532.

REAL PROPERTY — ADDITIONAL BURDEN — RIGHTS OF ABUTTING OWNERS. — *Held*, that building and operating a steam railroad in the streets of the city of St. Louis under authority from the city, was not such a perversion of the highway from its original purposes as to render the railway company liable in damages to the abutting owners for the additional burden imposed. *Henry Ganes & Sons Manuf. Co. v. Ry.*, 20 S. W. Rep. 658 (Mo.).

This agrees with earlier cases in Missouri, but the weight of authority is *contra*. *Lewis, Eminent Domain*, § 115, and note.

REAL PROPERTY — DEDICATION — ACCEPTANCE. — Where a strip of land had been platted and laid out as a highway, *held*, that four years' use by the public was sufficient to constitute an acceptance, and make the dedication complete. *Los Angeles Cemetery Ass'n v. City of Los Angeles*, 32 Pac. Rep. 240 (Cal.).

There is very little authority in this country as to whether use for a time less than the period of prescription will constitute an acceptance. The weight of authority seems to be with this case.

REAL PROPERTY — STATUTE OF FRAUDS — INTEREST IN LAND. — A sale of growing trees to be felled and removed by the vendee is a contract concerning land within the provisions of the Statute of Frauds. *Hietz v. Graham*, 33 N. E. Rep. 90 (Ohio).

The case is one of first impression in Ohio; the authorities are somewhat in conflict, and the subject has been confused by the case of *Marshall v. Green*, 1 C. P. D. 35, which the learned judge criticises. The decision seems sound.

REAL PROPERTY — TRESPASS ON A HIGHWAY — RIGHTS OF THE OWNER OF THE FEE. — The defendant was the owner of a grouse moor crossed by a highway, the soil of which was vested in him. On the occasion of a grouse drive upon this moor, the plaintiff went upon the highway, not for the purpose of using it as a highway, but solely for the purpose of using it to interfere with the defendant's enjoyment of his right of shooting, by preventing the grouse from flying towards the butts occupied by the shooters. The defendant's keepers having forcibly prevented the plaintiff from such interference, he brought an action for assault against the defendant, in which the defendant justified on the ground that the plaintiff was a trespasser upon his land on the occasion in question, and by way of counter-claim asked for damages and a declaration of his rights. *Held*, that, inasmuch as the plaintiff was upon the highway for purposes other than its use as a highway, he was a trespasser, and that verdict should be entered for the defendant on his justification, and for nominal damages on his counter-claim. *Held* further, Lord Esher, M. R., *dissenting*, that the court ought to make a declaration of the defendant's rights to the above effect. *Harrison v. Duke of Rutland et al.*, [1893] 1 Q. B. 142 (Eng.).

This decision was in the Court of Appeal, and was in reversal of the judgment of the Lord Chief Justice. The result seems as correct as it is picturesque. *Cole v. Drew et uxor*, 44 Vt. 49; *Wellman v. Dickey*, 78 Me. 29.

STATUTE OF FRAUDS — SUFFICIENCY OF A RECITAL IN A WILL AS A MEMORANDUM. — A, being a member of a partnership firm consisting of A, B, and C, verbally agreed with B and C to guarantee them against loss in respect of an existing debt due the partnership from his son. A died, having by his will given a share of his estate to his son's wife and children; and, after referring to his son's indebtedness to the firm, and stating that he had guaranteed the firm against loss in respect of the debt, he directed that the amount of the debt should be brought into hotchpot in ascertaining

the share given by his will. By a codicil he "confirmed the guarantee mentioned in his will." *Held*, that although the mention of the guarantee in the will should be construed as made only for the purpose of explaining the directions which the testator was about to give, any writing embodying the terms of the agreement, and signed by the person to be charged, was sufficient "to satisfy the Statute of Frauds, since the object of the statute was merely to require written evidence signed by the party to be charged. *In re Hoyle; Hoyle v. Hoyle*, [1893] 1 Ch. 84 (Eng.).

This case is clearly in accord with the trend of authorities. Browne on the Statute of Frauds, §§ 346 and 354a.

TORTS—NEGLIGENCE—PROXIMATE CAUSE.—Through defendant's negligence in permitting an opening in a bridge to remain open, a child fell into a canal, and the father in an effort to rescue it was drowned, together with the child. *Held*, that the death of both must be attributed to the negligence of defendants. *Gibney v. State*, 33 N. E. Rep. 142 (N. Y.).

The contention here was that the causal connection between defendant's negligence and the death of the father was broken by his own act. It seems perfectly clear, however, that such an act is as purely instinctive as one of self-preservation; consequently, there is no conscious act intervening to break the chain of causes. *The Balloon Case (Guille v. Swan)*, 19 Johns. 381, and *Thomas v. Winchester*, 6 N. Y. 397, are cited as supporting the conclusion of the court; but in both of those cases the intervening agents were acting consciously.

TRUSTS—FOLLOWING TRUST FUNDS.—An administratrix applied a portion of the funds of the intestate estate in part payment of the price of land, which had previously been conveyed to her on her own credit and for her own benefit. *Held*, that there was not a resulting trust of the land in favor of the estate, since the funds of the estate formed no part of the original consideration for the conveyance, and such a trust can result, if at all, only at the time the title vests. *Bowen v. Hughes*, 32 Pac. Rep. 98 (Wash.).

The decision is certainly correct, but the reasoning, it is submitted, is not satisfactory. The doctrine of resulting trust would seem to have no application, since it is a case, not of payment of the purchase-money by a third party, but of a misappropriation of funds by the purchaser. The case is, therefore, one of following trust property. The true *ratio decidendi* would seem to be that, as the title to the land had already vested in the administratrix, the real product of the misappropriated trust-funds was, not the land, but the claim of the vendor against the administratrix for the purchase-money; and the plaintiff, instead of seeking to obtain the land, should have proceeded against the administratrix on the aforesaid claim, which equity would keep alive for his benefit.

TRUSTS—VOLUNTARY RELEASE—CONSIDERATION.—A, by writing, consented to the remission of 50,000 francs from the indebtedness of his daughter B to him. He also informed A that he had transferred to her account on his books the sum of \$14,000 (for which he was indebted to his deceased wife), in accordance with his deceased wife's last wishes. B was to hold this as trustee for her sister C. *Held*, that the transfer to B was supported by a valuable consideration, *i. e.*, the indebtedness to the wife, and that the trust in favor of C was validly created; that the release of the daughter's indebtedness was invalid, not being supported by any consideration. *Landon v. Hutton*, 25 Atl. Rep. 953 (N. J.).

The decision of the court would seem to be correct. According to the wishes of the wife, A was equitably bound to pay the amount of his indebtedness to C. When he made B trustee for C, he made himself B's debtor, and B trustee of the debt for the benefit of C. The court, without any particular justification, set forth the doctrine that a meritorious consideration did not exist to support the trust. This was scarcely necessary when they had already declared it valid on another ground.

WILLS—CONSTRUCTION—CONFLICTING DEVISES.—Testator devised a tract of land to A in fee, and by a later clause of the same will devised the same tract to B in fee. *Held*, that as it was evident from the facts of the case that the conflict was due to a mistake in description rather than to any intention on the part of the testator that the second clause should supersede the first, A and B should take the land as tenants in common. *Day et al. v. Wallace*, 33 N. E. Rep. 185 (Ill.).

This is a case of first impression in Illinois; and the court, recognizing that the authorities are divided, has adopted Lord Brougham's suggestion in *Sherratt v. Bentley*, 2 M. & K. 149, at p. 165, which is approved in 1 Redf. Wills, 443, and 1 Jarm. Wills, 476. It is held in some jurisdictions that such devises as these are hopelessly repugnant, and that the second devise must therefore revoke the first. See *Hollins v. Coonan*, 9 Gill. 62; *Covert v. Sebern*, 35 N. W. Rep. 636 (Ia.).

REVIEWS.

GENERAL DIGEST OF THE UNITED STATES ANNUAL, Vol. VII. One volume, pp. 2,334, liv. Prepared and published by the Lawyers' Co-operative Publishing Co., Rochester, N. Y. 1892.

The feature of this digest is the care and scholarship of its statement of cases. There it does not incorporate or boil down head-notes, but states clearly and concisely the meat of the case. Another point in its favor is the table of contents of the topic placed at the head of each extensive topic. In print and paging it is fair, but only fair, while its cross-references are numerous.

Even after allowing for the facts that the American Digest, comparison with which is natural, probably subdivides and elaborates more, and that our digest economizes space by its manner of stating cases, it is still difficult to see why, when their material and purposes are the same, the latter should cover only one third as many pages.

J. C.

LAWYERS' REPORTS, ANNOTATED, Book XVI., with full Annotation by Burdett A. Rich and Henry P. Farnham. One volume, pp. 911. Rochester, N. Y. The Lawyers' Co-operative Publishing Company. 1892.

What Smith's Leading Cases did for the reports at large, this work attempts to do for the current reports, collecting and annotating the leading cases of each quarter of the judicial year. Its value must vary directly with the ability of the annotators. Judging from that in the past the book is valuable.

In print, paper, and binding the work is fair. It concludes with a *résumé* of the law made during the past quarter, and with a sufficiently extensive general index.

J. C.

A TREATISE ON WILLS. By Thomas Jarman, Esq. Fifth edition, by Leopold George Gordon Robbins, Esq. Sixth American edition, by Melville M. Bigelow, Ph. D. Two volumes. Boston. Little, Brown & Co. 1893.

Little more need be said of this the latest edition after saying that it is the standard treatise on wills, brought down to date in a manner fully equal to that of its predecessors.

Chiefly noticeable in the English editor's work is the effect of the Wills Act, that statute having made it necessary to largely cut parts of the original work, and replace them with decisions since the Act. The elaborate notes of the American editor are suggestive, and quite in keeping with his usual good work. To the appendix have been added suggestions as to the preparation of wills intended to operate abroad.

The volume is one of the first law books to be protected by international copyright.

G. R. P.

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QUASI-CONTRACT, ITS NATURE AND SCOPE.

IT is usual to divide contracts into three classes, —

1. Simple contracts.
2. Contracts under seal.
3. Contracts of record.

Where this classification is made, simple contracts are subdivided into

1. Express contracts.
2. Contracts implied in fact.
3. Contracts implied in law.

In this classification of contracts, obligations of a quasi-contractual nature are treated either as simple contracts or as contracts of record.

This treatment of quasi-contract is, in the opinion of the writer, not only unscientific, and therefore theoretically wrong, but is also destructive of clear thinking, and therefore vicious in practice.

It needs no argument to establish the proposition that it is not scientific to treat as one and the same thing an obligation that exists in every case because of the assent of the defendant, and an obligation that not only does not depend in any case upon his assent, but in many cases exists notwithstanding his dissent. And yet with this wide difference between simple contracts and quasi-contracts, the latter are generally treated to-day as a species of simple contract.

Equally objectionable in principle, though perhaps not so misleading in practice, is the classification of such quasi-contracts as cannot by any possibility be treated as simple contracts, as contracts of record.

A true contract, whether it be a simple contract, a specialty, a contract in the nature of a specialty, or a contract of record, exists as an obligation, because the contracting party has *willed*, in circumstances to which the law attaches the sanctification of an obligation, that he should be bound. Had he not so willed, he would not be under a contractual obligation. This statement is as true of a contract implied in fact as of an express contract. Indeed, the division of simple contracts into "express contracts" and "contracts implied in fact" does not involve a consideration of the principles of contracts at all.¹

In the case of a contract implied in fact, as much as in the case of an express contract, the plaintiff must prove that the defendant either made or accepted an offer which resulted in a promise on the defendant's part, and that the promise was not only in fact made, but that a sufficient consideration was given therefor. If the defendant gave in words a promise containing all the terms of the contract which the plaintiff claims that he made, for a consideration expressly requested in words by him, in exchange therefor, then the contract is an express contract. Thus, if A should say to B: "I will promise to sell you my horse X for the sum of \$500 in cash if you will promise to purchase on these terms," and B should so promise, an express contract would be thereby created. Suppose, however, that A should write to a livery-keeper, simply requesting him to send a coupé to his house at a certain hour, and the coupé was sent and used by A, there would certainly be no express contract in such a case, since A has never in words said that he intended to assume any obligation in favor of B. And yet A's conduct speaks quite as loudly as words, and leaves no doubt of his intention to enter into a contract with B for the use of the coupé. No one would question that A has communicated such an intention to B, and that he can be fairly said to have promised to pay him for the use of his property, and that to allow the defendant to escape liability would defeat the intention of the parties quite as much as to allow the defendant to refuse to be bound by his contract to sell the horse in the case first supposed.

¹ *Marzetti v. Williams*, 1 B. & Ad. 415; *Hertzog v. Hertzog*, 29 Pa. St. 465.

The difference between the cases is a difference simply in the kind of the evidence used to establish the contract. In the one case the language of contract is in terms used, and because of the expressions used the contract is called an express contract; whereas in the other case the contract is established by the conduct of the parties, viewed in the light of surrounding circumstances.

The terms "express contracts" and "contracts implied in fact" are used then to indicate, not a distinction in the principles of contract, but a difference in the character of the evidence by which a simple contract is proved. The source of the obligation in each case is the intention of the parties.

The phrase "contract implied in law" is used, however, to denote, not the nature of the evidence by which the claim of the plaintiff is to be established, but the source of the obligation itself. It is a term used to cover a class of obligations where the law, though the defendant did not intend to assume an obligation, imposes an obligation upon him, notwithstanding the absence of intention on his part, and in many cases in spite of his actual dissent.

The identity in principle of express contracts and contracts implied in fact, and the distinction between a genuine contract, whether express or implied in fact, and a quasi-contract, commonly called a contract implied in law, is thus stated by Maine in his "Ancient Law:"¹—

"The part of Roman law which has had most extensive influence on foreign subjects of inquiry has been the law of Obligation, or, what comes nearly to the same thing, of Contract and Delict. The Romans themselves were not unaware of the offices which the copious and malleable terminology belonging to this part of their system might be made to discharge, and this is proved by their employment of the peculiar adjunct *quasi* in such expressions as Quasi-Contract and Quasi-Delict. 'Quasi,' so used, is exclusively a term of classification. It has been usual with English critics to identify the quasi-contracts with implied contracts; but this is an error, for implied contracts are true contracts, which quasi-contracts are not. In implied contracts, acts and circumstances are the symbols of the same ingredients which are symbolized, in express contracts, by words; and whether a man employs one set of symbols or the other must be a matter of indifference so far as concerns the theory of agreement. But a quasi-contract is not a contract at all. The commonest sample of the class is the relation subsisting between two persons, one of whom has paid money to the other through mistake.

¹ 4th ed. 343-346.

The law, consulting the interests of morality, imposes an obligation on the receiver to refund; but the very nature of the transaction indicates that it is not a contract, inasmuch as the convention, the most essential ingredient of contract, is wanting. This word 'quasi,' prefixed to a term of Roman law, implies that the conception to which it serves as an index is connected with the conception with which the comparison is instituted by a strong superficial analogy or resemblance. It does not denote that the two conceptions are the same, or that they belong to the same genus. On the contrary, it negatives the notion of an identity between them; but it points out that they are sufficiently similar for one to be classed as the sequel to the other, and that the phraseology taken from one department of law may be transferred to the other, and employed without violent straining, in the statement of rules which would otherwise be imperfectly expressed."

Notwithstanding the existence and recognition of this well-defined line of demarcation between genuine contracts, whether express or implied, and quasi-contracts, there exists the greatest confusion in the application thereof in practice. Thus Blackstone confuses contracts implied in fact and quasi-contracts, when he says:¹—

"This contract or agreement may be either express or implied. *Express* contracts are where the terms of the agreement are openly uttered and avowed at the time of the making, as to deliver an ox, or ten load of timber, or to pay a stated price for certain goods. *Implied*, are such as reason and justice dictate, and which, therefore, the law presumes that every man undertakes to perform. As if I employ a person to do any business for me, or perform any work; the law implies that I undertook, or contracted, to pay him as much as his labor deserves. If I take up wares from a tradesman, without any agreement of price, the law concludes that I contracted to pay their real value."

While this definition of an implied contract is, at best, true only of quasi-contracts, all the cases put are illustrations of contracts implied in fact. Mr. Justice Lowrie, referring to the language just quoted from Blackstone, properly says:²—

"There is some looseness of thought in supposing that reason and justice ever dictate any contracts between parties, or impose such upon them. All true contracts grow out of the intentions of the parties to transactions, and are dictated only by their mutual and accordant wills. When this intention is expressed, we call the contract an express one.

¹ 2 Bl. Com. 443.

² *Hertzog v. Hertzog*, 29 Pa. St. 465, 467.

When it is not expressed, it may be inferred, implied, or presumed, from circumstances as really existing; and then the contract, thus ascertained, is called an implied one. The instances given by Blackstone are an illustration of this.

"But it appears in another place, 3 Comm. 159-166, that Blackstone introduces this thought about reason and justice dictating contracts, in order to embrace, under this definition of an implied contract, another large class of relations which involve no intention to contract at all, though they may be treated as if they did. Thus, whenever, not our variant notions of reason and justice, but the common sense and common justice of the country, and therefore the common law or statute law, impose upon any one a duty, irrespective of contract, and allow it to be enforced by a contract remedy, he calls this a case of implied contract. Thus out of torts grows the duty of compensation, and in many cases the tort may be waived, and the action brought in *assumpsit*.

"It is quite apparent, therefore, that radically different relations are classified under the same term; and this must often give rise to indistinctness of thought. And this was not at all necessary; for we have another well-authorized technical term exactly adapted to the office of making the true distinction. The latter class are merely *constructive* contracts, while the former are truly implied ones. In one case, the contract is mere fiction, — a form imposed in order to adapt the case to a given remedy; in the other, it is a fact legitimately inferred. In one, the intention is disregarded; in the other, it is ascertained and enforced. In one, the duty defines the contract; in the other, the contract defines the duty."

Yet the learned Justice, after so intelligently criticising Blackstone, falls into the same confusion of statement when he says, in the same opinion:¹ —

"The law ordinarily presumes or implies a contract whenever this is necessary to account for other relations found to have existed between the parties.

"Thus if a man is found to have done work for another, and there appears no known relation between them that accounts for such service the law presumes a contract of hiring. But if a man's house takes fire, the law does not presume or imply a contract to pay his neighbors for their services in saving his property. The common principles of human conduct mark self-interest as the motive of action in the one case, and kindness in the other; and therefore, by common custom, compensation is mutually counted on in one case, and in the other not."

¹ *Hertzog v. Hertzog*, 29 Pa. St. 465, 468.

Plainly, in the case put by Mr. Justice Lowrie, the inference of a contract is one of fact ; and in another part of the same opinion the learned Justice clearly regards the inference as one of fact and not one of law, when he says :¹ —

“Every induction, inference, implication, or presumption in reasoning of any kind, is a logical conclusion derived from and demanded by certain data or ascertained circumstances. If such circumstances demand the conclusion of a contract to account for them, a contract is proved ; if not, not. If we find, as ascertained circumstances, that a stranger has been in the employment of another, we immediately infer a contract of hiring, because the principles of individuality and self-interest, common to human nature, and therefore the customs of society, require the inference.”

In the opinion of Lord Justice Lindley, it was the failure of Lord Justice Brett to recognize the distinction in question, which led him to doubt² that a lunatic was liable for necessities furnished to him, by one knowing of his lunacy. On this point Lord Justice Brett expressed himself as follows : —

“A question has been flushed, if I may use the word, in this case which it is not necessary to decide, namely, whether if a person supplies necessities to a lunatic, knowing of the lunacy at the time, a contract on the part of the lunatic to pay for them can be implied. I give no opinion upon that point. It has not been fully argued to-day, and it appears to me to involve a very difficult point of law, which I do not think has ever been settled by authority. For my part I should doubt whether in favor of a person who knows of the lunacy you can imply a contract to pay for a supply of necessities to a lunatic.”

In *Rhodes v. Rhodes*,³ Lord Justice Lindley, referring to the doubt raised by Lord Justice Brett, said : —

“The question whether an implied obligation arises in favor of a person who supplies a lunatic with necessities is a question of law, and *In re Weaver*, a doubt was expressed whether there is any obligation on the part of the lunatic to repay. I confess I cannot participate in that doubt. I think that that doubt has arisen from the unfortunate terminology of our law, owing to which the expression ‘implied contract’ has been used to denote, not only a genuine contract established by inference, but also an obligation which does not arise from any real contract,

¹ *Hertzog v. Hertzog*, 29 Pa. St. 465, 469.

² 44 Ch. D. 94, 107.

³ *In re Weaver*, 21 Ch. D. 615-620.

but which can be enforced as if it had a contractual origin. Obligations of this class are called by civilians *obligationes quasi ex contractu*."

It was this confusion of ideas that caused the counsel in *Sceva v. True*,¹ to contend, that as an insane person was not able to contract, the defendant was not liable for necessities furnished to her by one knowing her to be insane. The counsel's argument in that case was as follows :—

"The foundation principle of the entire law of contract is, that the parties must have the capacity to contract, and must actually exercise their faculties by contracting. Here there was no capacity, for there was but one mind ; no contract was made, and no attempt was made to make one. The two vital facts, without which no contract, tacit or express, can exist, — capacity and its exercise, — are wanting. Was there an implied contract? What does that term mean? In thousands of cases, in the books, we know just what it means. The parties have capacity to contract ; facts, circumstances, few or many, clear or complicated, exist, which lead the minds of the jurors to the conclusion that the minds of the parties met. Minds may meet by words, acts, or both. The words even may negative such meeting ; but 'acts which speak louder than words' may conclude him who denies a tacit contract. Aside from cases where the capacity to contract is wanting, no instance now occurs to us in which the implied contract cannot be supported upon these principles, and the familiar doctrines of waiver and estoppel. . . . It is another fundamental principle that no one, by voluntarily performing services for another, can make the other his debtor. If these principles apply to cases where the contracting mind is wanting, they settle this case. We know it is sometimes said, in such a case, 'the law will imply a contract.' What does that mean? As it seems to us, only this : that where A, who has capacity to contract, furnishes B, who is totally destitute of such capacity, what is proper for B to have, the judges will turn the bench into a broker's board, will substitute themselves for B, make a contract where none existed, cause it to relate back to the voluntary acts of A, and then sit in judgment upon and enforce their own contract. It is a perversion of language to call such a performance a contract of any kind. It is judicial usurpation. The Constitution gave the court no such power. The court has no power to make contracts for people : it can only infer one where a jury might."

To this argument the court made the following conclusive answer :—

¹ 53 N. H. 627.

"We regard it as well settled by the cases referred to in the briefs of counsel, many of which have been commented on at length by Mr. Shirley for the defendant, that an insane person, an idiot, or a person utterly bereft of all sense and reason by the sudden stroke of accident or disease, may be held liable, in assumpsit, for necessities furnished to him in good faith while in that unfortunate and helpless condition. And the reasons upon which this rests are too broad, as well as too sensible and humane, to be overborne by any deduction which a refined logic may make from the circumstances that in such cases there can be no contract or promise in fact, no meeting of the minds of the parties. The cases put it on the ground of an implied contract; and by this is not meant, as the defendant's counsel seems to suppose, an actual contract, — that is, an actual meeting of the minds of the parties, an actual mutual understanding, to be inferred from language, acts, and circumstances, by the jury, — but a contract and promise, said to be implied by the law, where, in point of fact, there was no contract, no mutual understanding, and so no promise. The defendant's counsel says it is usurpation for the court to hold, as matter of law, that there is a contract and a promise, when all the evidence in the case shows that there was not a contract, nor the semblance of one. It is doubtless a legal fiction, invented and used for the sake of the remedy. If it was originally usurpation, certainly it has now become very inveterate, and firmly fixed in the body of the law."¹

Not only has this identification in classification of quasi-contracts with genuine contracts led to a confusion of ideas, but it has also rendered the interpretation of written laws or statutes exceedingly difficult where the word "contract" is used; thus, for example, in *Dusenbury v. Speir*,² the legality and arrest turned upon the meaning to be given to the phrase "contract express or implied," as used in statutes regulating arrests in civil actions. The plaintiff had been arrested in an action, corresponding to the common-law action, of money had and received, brought to recover money which the plaintiff, the defendant in that action, had fraudulently obtained. The plaintiff was arrested on a warrant issued on the theory that the action was that of contract, express or implied, within the meaning of the statute. It was held that his liability was in quasi-contract, and not in contract, and that as the phrase "contract express or implied" was used in the statutes with reference solely to genuine contracts, the arrest was illegal, and the judgment of

¹ Illustrations of this confusion of ideas might be multiplied indefinitely; but it seems unnecessary to cite them here, as further illustrations will be offered in the discussion of the scope of quasi-contract.

² 77 N. Y. 144.

the lower court was reversed. And yet the court, whose judgment was reversed by the Court of Appeals, recognized as fully as did the Court of Appeals that the obligation to return the money was a quasi-contractual, and not a contractual, obligation.¹

In *O'Brien v. Young*,² the question involved was the construction of the statute reducing the rate of interest from seven per cent to six per cent. The statute contained a clause excepting from its operations "any contract or obligation made before the passage of this Act." It was contended that a judgment obtained before the passage of the Act was exempted from its operations, and that the judgment creditor was, therefore, entitled to six per cent interest. But the court reversed the judgment of the lower court, holding that the clause in question referred, not to quasi-contracts, but to genuine contracts only, and that, therefore, the judgment creditor was entitled to only six per cent after the passage of the Act.

But in *The Gutta Percha Shoe Co. v. Mayor, etc.*,³ it was held that although a judgment was not a genuine contract, yet an

¹ Probably no clearer statement of the distinction between a genuine contract and a quasi-contract can be found than is contained in the following statement, taken from the opinion of Mr. Justice Danforth in this case:—

"We cannot agree with the learned judge in this construction of the statute. On the contrary, we think that the express contract referred to in the statute is one which has been entered into by the parties, and upon which, if broken, an action will lie for damages, or is implied, when the intention of the parties, if not expressed in words, may be gathered from their acts and from surrounding circumstances; and in either case must be the result of the free and *bona fide* exercise of the will, producing the *aggregation*, the joining together of two minds, essential to a contract at common law. There is a class of cases where the law prescribes the rights and liabilities of persons who have not in reality entered into any contract at all with one another, but between whom circumstances have arisen which make it just that one should have a right, and the other should be subject to a liability, similar to the rights and liabilities in certain cases of express contract. Thus, if one man has obtained money from another through the medium of oppression, imposition, extortion, or deceit, or by the commission of a trespass, such money may be recovered back, for the law implies a promise from the wrong-doer to restore it to the rightful owner, although it is obvious that is the very opposite of his intention. Implied or constructive contracts of this nature are similar to the constructive trusts of courts of equity, and in fact are not contracts at all. And a somewhat similar distinction is recognized in the civil law, where it is said: 'In contracts it is the consent of the contracting parties which produces the obligation; in quasi-contracts there is not any consent. The law alone, or natural equity, produces the obligation by rendering obligatory the fact from which it results. Therefore these facts are called quasi-contracts, because, without being contracts, they produce obligations in the same manner as actual contracts.'"

² 95 N. Y. 428.

³ 108 N. Y. 276.

attachment could issue in an action brought on a foreign judgment under a section of the code of civil procedure, allowing an attachment against property, in an action brought for "breach of contract, express or implied, other than a contract to marry." Yet the same court held, in *Remington Paper Co. v. O'Dougherty*,¹ that the attachment could not issue under the same section of the code, in an action brought to enforce a statutory liability created by the Legislature of New York to pay the cost of an action.

The question naturally arises, why a classification productive of so much confusion was ever adopted. The answer to this question is to be sought, not in the substantive law, but in the law of remedies.

The only forms of action known to the common law were actions of tort and contract. If the wrong complained of would not sustain an action, either in contract or tort, then the plaintiff was without redress, unless the facts would support a bill in equity.²

Although from time to time the judicial view of substantive rights broadened under the leavening effect of equity and other considerations, the broadening process did not lead to the creation of remedies sounding in neither contract nor tort. The judges attempted, however, by means of fictions, to adapt the old remedies to the new rights, with the result usually following the attempt to put new wine into old bottles. Thus, largely through the action of assumpsit, that portion of the law of quasi-contract usually considered under the head of simple contracts, was introduced into our law.

In the action of assumpsit, as the word assumpsit implies, whether it be special or indebitatus assumpsit, a promise must always be alleged,³ and at one time it was an allegation which had to be proved.⁴ It was only natural, therefore, that the courts in using a purely contractual remedy to give relief in a class of cases possessing none of the elements of contract should have resorted to fictions to justify such a course. This was done in the extension of assumpsit to quasi-contract; and the insuperable difficulty of proving a promise where none existed was met by the statement that "the law implied a promise." The statement that the *law imposes the*

¹ 96 N. Y. 666, affirming 32 Hun, 255.

² 1 Spence, Eq. Jur. 243; *Wood v. Ayres*, 20 Mich. 345; *Sceva v. True*, 53 N. H. 627.

³ Chitty on Pleading, 301.

⁴ Ames, *The History of Assumpsit*, 2 Harv. Law Rev. 64.

obligation would not have met the difficulties of the situation, since the action of *assumpsit* presupposed the existence of a promise. The fiction of a promise was adopted then in this class of cases solely that the remedy of *assumpsit* might be used to cover a class of cases where, in fact, there was no promise.

It might be asked why did the court extend to this class of obligations the remedies peculiar to contracts, rather than the remedies peculiar to tort. The right conferred in quasi-contract, and the right, the violation of which constitutes a tort, undoubtedly possess this common characteristic, that the obligation is imposed by operation of law, regardless of the consent of the defendant. But treating a tort as the violation of a right *in rem*, the obligations differ in an important particular; for while to avoid committing a tort, one need only forbear,¹ to discharge the obligation imposed by quasi-contract, one must act.² It is true that the obligation imposed by a contract may be simply to forbear; but the obligation most generally assumed under a contract requires one to act, and therefore contract rather than tort would naturally suggest an analogy. Another consideration would also suggest the analogy of contract rather than of tort; not only in most cases where a quasi-contractual contract is imposed has the defendant not acted in violation of a right *in rem*, in consequence of which the law could impose an obligation, but in many cases he has either not acted at all, as, for example, where one, in the absence of a husband, who is ignorant of the death of his wife, defrays the funeral expenses, or, if he has acted, has acted with the consent and perhaps the co-operation of the plaintiff; as, for example, where a plaintiff pays money under mistake to a defendant, who shares in the mistake made by the plaintiff.

It remains to consider the scope of quasi-contract.³

Quasi-contracts may be said in general to be founded,⁴ —

1. Upon a record.
2. Upon a statutory, or official, or customary duty.

¹ Austin, Jurisprudence, Lect. XIV.

² Illustrations of this proposition will be given in discussing the scope of the obligation.

³ No attempt will be made in this connection to do more than classify the liabilities recognized as obligations existing in law. The writer reserves for separate treatment the consideration of the facts that should exist in any given case to entitle one to recover on principles of quasi-contract.

⁴ Ames, The History of Assumpsit, 2 Harv. Law Rev. 64.

3. Upon the doctrine that no one shall be allowed unjustly to profit or enrich himself at the expense of another.

The obligation created by a judgment, which, as Sir William Anson has said, is unfortunately styled a contract of record in English law, resting, not upon the agreement of the parties, but regardless thereof, is a quasi-contractual, and not a contractual obligation.¹ In *Louisiana v. New Orleans*,² Mr. Justice Field, delivering the opinion of a court, in support of the decision that a judgment was not a contract within the meaning of that word as used in the clause of the Constitution forbidding the passing of a law by a State impairing the obligation of a contract, said :—

“A judgment for damages, estimated in money, is sometimes called by text-writers a specialty or contract of record, because it establishes a legal obligation to pay the amount recovered; and by a fiction of law a promise to pay is implied where such legal obligation exists. It is on the principle that an action *ex contractu* lies upon a judgment. But this fiction cannot convert a transaction wanting the consent of parties into one which necessarily implies it.”

A statutory obligation resting, not upon the consent of the parties, is clearly quasi-contractual in its nature.³ In *Steamship Co. v. Joliffe*,⁴ Mr. Justice Field, in discussing the nature of the claim for half-pilotage fees under a statute allowing such fees, where a pilot's services are offered and declined, thus distinguishes between a contract liability and a liability imposed by statute :—

“The transaction in this latter case, between the pilot and the master or owners, cannot be strictly termed a contract, but it is a transaction to which the law attaches similar consequences; it is a *quasi-contract*. The absence of assent on the part of the master or owner of the vessel does not change the case. In that large class of transactions designated in the law as implied contracts, the assent or convention which is an essential ingredient of an actual contract is often wanting . . .

“The claim of the plaintiff below for half-pilotage fees resting upon a transaction regarded by the law as *quasi* contract, there is just ground for the position that it fell with the repeal of the statute under which the transaction was had.”

¹ *Biddleston v. Whytel*, 3 Burr. 1545; *State of Louisiana v. New Orleans*, 109 U. S. 285; *O'Brien v. Young*, 95 N. Y. 428.

² 109 U. S. 285.

³ *Steamship Co. v. Joliffe*, 2 Wall. 450; *Louisiana v. New Orleans*, 109 U. S. 285; *Inhabitants of Milford v. Commonwealth*, 144 Mass. 64; *Woods v. Ayres*, 39 Mich. 345; *McCoun v. New York Central & Hartford R. R. Co.*, 50 N. Y. 176.

⁴ 2 Wall. 450.

In *Inhabitants of Milford v. Commonwealth*,¹ the court, discussing the nature of the plaintiff's claim for the support of a pauper under a statute imposing upon the Commonwealth an obligation to reimburse the plaintiff for the expenses so incurred, recognizes the distinction between a contract liability and a liability imposed by statute in the following language :—

"The law regards the money as expended at the implied request of the defendant, and a promise to pay the money is said to be implied from the liability created by the statute. A contract may be expressly made, or a contract may be inferred or implied when it is found that there is an agreement of the parties and an intention to create a contract, although that intention has not been expressed in terms of contract ; in either case, there is an actual contract. But a contract is sometimes said to be implied when there is no intention to create a contract, and no agreement of parties ; but the law has imposed an obligation which is enforced as if it were an obligation arising *ex contractu*. In such a case there is not a contract, and the obligation arises *ex lege*."

Of a quasi-contractual nature, it is submitted, is the duty of a carrier, founded upon the custom of the realm to receive and to carry safely. That the liability in such cases arises, not from contract, but from a duty, is clear.² While it is true that the liability is ordinarily described as one in tort, it is submitted that it has been so described because of the usual classification of legal rights into contracts and torts, and that since the obligation imposed upon the carrier is *to act*, the obligation is really quasi-contractual in its nature, and not in the nature of a tort. If this be the proper classification of the duties imposed by law upon a carrier, it must necessarily be true of the common law liability of an innkeeper to receive guests, or to keep their goods safely.³ The obligation in these cases seems analogous in principle to the obligation imposed by the Austrian law upon one in possession under a *fidei commiss* in favor of his successor, as to the care of the property. That liability is thus described by Lord Justice Cotton in *Batthyany v. Walford* :⁴—

"It appears, as far as I understand the evidence, that the law of Austria (I will omit Hungary, because the Hungarian law on this head is

¹ 144 Mass. 64.

² Anonymous, 12 Mod. 3; *Marshall v. York, N. & B. Railway Co.*, 11 C. B. 655; *Austin v. Great Western Railway Co.*, L. R. 2 Q. B. 442, 445.

³ *Morgan v. Ravey*, 6 H. & N. 265, 275.

⁴ 36 Ch. Div. 269, 278.

practically the same as that of Austria) is this: The tenant in possession under a *fidei commiss*, both of real and personal estate, is considered in possession in a different way from that in which a tenant for life or a tenant in tail in England stands. There are no trustees, and if he loses any portion of the personal estate, which apparently stands as regards the provision of the *fidei commiss* nearly in the same position as real estate, he must make that loss good. As regards the real estate, he is answerable, at the time when he surrenders, by death or otherwise, the possession of the property in the *fidei commiss*, for the deterioration of the estate which has taken place since the time when he took possession. He is considered as having possession of the estate, not only for his own benefit, but subject also to an obligation to hand it over to his successor in as good a condition as when he took possession, subject only to this, that he can excuse himself if he shows that the deterioration took place without any fault ('culpa,' as it is called) on his part. But, as I understand the evidence, the claim according to the law of Austria is not in the nature of damages for default, but a claim under an obligation to keep the property in as good condition as the late possessor found it, with liberty to excuse himself from making good the deficiency if he can show that it was not caused by any default of his own. That, in my opinion, is not a claim simply depending on tort, and does not come within the rule of *actio personalis moritur cum persona*. It may be that it is a wrong which has produced the deterioration; but the claim, in my opinion, is one depending on the implied contract or obligation which, by the law of Austria, every possessor under a *fidei commiss* takes upon himself when he enters into possession.

"It was contended that there could be no such liability of a personal representative for anything connected with default, unless there was an express contract. No authority was referred to in support of that proposition, and in my opinion it is contrary to English law. We had to consider this subject in *Phillips v. Homfray*,¹ where minerals had been dug from a neighbor's property, and there Lord Justice Bowen gave a very carefully considered judgment, expressing his own and my views as regards this particular point. What he says is this:² 'As regards all actions essentially based on tort, the principle' (*i.e.*, *actio personalis moritur cum persona*) 'was inflexibly applied. There was, however, a species of personal actions to which the rule in question was not extended. These were such as were founded upon some obligation, contract, debt, covenant, or other duty to be performed. If an injury has been done to the personal property of the plaintiff, for relief arising out of which assumpsit could be brought (as in the case of actions against carriers and bailees), the executors of the deceased might well be sued.' That, in my opinion,

¹ 24 Ch. D. 439.

² 24 Ch. D. 456.

correctly lays down the law. It is not only where there is an express contract that a suit grounded on some default of the person whose representative is sued can be maintained; but if the position of the parties was such that the law of England would imply a contract from that position, then on assumpsit the executor might still be held liable. There are many cases where an action can be brought upon an obligation implied by law in consequence of the position which the parties have undertaken one to another."

Of this nature also, it is submitted, is the obligation of a sheriff to levy execution and pay the proceeds thereof to a judgment creditor.¹

By far the most important and most numerous illustrations of the scope of quasi-contract are found in those cases where the plaintiff's right to recover rests upon the doctrine that a man shall not be allowed to enrich himself unlawfully at the expense of another.

As the question to be determined is not the defendant's intention, but what in equity and good conscience the defendant ought to do, the liability, while enforced in the action of assumpsit, is plainly of a quasi-contractual, and not contractual nature.

It is on the theory of quasi-contract, founded on the doctrine of unjust enrichment, that an insane man, known to be insane by the party furnishing necessities, is held liable therefor. That such is the nature of the liability is evident, not only from the fact that he has no contracting mind, but also from the fact that he is equally liable for necessities furnished at a time when there was no attempt on his part to contract.²

In discussing the existence and nature of the obligation incurred by a lunatic for necessities, Lord Justice Cotton, in *Rhodes v. Rhodes*,³ thus stated the nature thereof:—

"Now the term 'implied contract' is a most unfortunate expression, because there cannot be a contract by a lunatic. But whenever necessities are supplied to a person who by reason of disability cannot himself contract, the law implies an obligation on the part of such person to pay for such necessities out of his own property. It is asked, Can there be an implied contract by a person who cannot himself contract in express

¹ *Speak v. Richards*, Hobart, 206, 3 Bl. Com. 163.

² *In re Rhodes*, 44 Ch. Div. 94 (*semble*); *Sawyer v. Lufkin*, 56 Me. 308; *Sceva v. True*, 53 N. H. 97.

³ 44 Ch. Div. 94, 105.

terms? The answer is, that what the law implies on the part of such a person is an obligation, which has been improperly termed a contract, to repay money spent in supplying necessities. I think that the expression 'implied contract' is erroneous and very unfortunate. In one case which was before the Court of Appeal, *In re Weaver*,¹ the question whether there could be what has been called an implied contract by a lunatic, was left undecided by the court, and one of the judges said that it was difficult to see how there could be an implied contract on the part of a lunatic if he was himself incompetent to make an express contract.

"But we all agree with the view that I have thus expressed, in order to prevent any doubt from arising in consequence of our having declined to settle the question in the case to which I have alluded."

Of a quasi-contractual nature also is the obligation of an infant to pay for necessities. It is usually stated that an infant is bound by his contract for necessities. But if, as is held in many jurisdictions, the infant is bound to pay for necessities, not the contract price, but the reasonable value thereof, it would seem clear that he is not liable on his contract. By the terms of his contract he is required to pay a stated sum, and not the reasonable value for necessities furnished. If he is bound by his contract to pay for necessities, then of course he should be liable in damages for having, in violation of his contract, refused to pay therefor; and if liable in damages, the amount of the plaintiff's recovery would be determined, not by the reasonable value of the necessities, but by the price agreed upon, — since had the infant performed his contract, the plaintiff would have received that amount of money. When, therefore, the infant is required to pay, not the stated price, but simply the reasonable value of the necessities, the obligation differs from that which he assumed; and though the result reached, as to the amount of the recovery, by a plaintiff in any given case, may be the same as would have been reached had the recovery been had on the theory of the plaintiff's being entitled to the price agreed upon, yet such a result is purely accidental. The doctrine, therefore,² that while the payee of a note given by an infant for necessities can recover on the note, he can recover, not the amount thereof, but simply the reasonable value of the necessities, must be regarded as an anomaly in procedure. In no other way can the result actually reached in some jurisdictions,³ that while the payee

¹ 21 Ch. Div. 615.

² 1 Daniel Neg. Inst., 4th ed., § 226.

³ 1 Daniel Neg. Inst., 4th ed., § 226.

of the note can recover in the action of a note the value of necessities furnished, an indorsee thereof has no right of action, be explained.

That the liability is really in quasi-contract seems to be recognized in the jurisdiction which has furnished the leading authority¹ for the proposition that the payee, while not allowed to recover the amount of the note, can, in an action brought on the note, recover the value of the necessities. In *Trainer v. Trumbull*,² where the court held an infant liable for necessities furnished in the absence of contract, Allen, J., delivering the opinion of the court, said :

"The practical question in this case is, whether the food, clothing, etc., furnished to the defendant were necessities for which he should be held responsible. This question must be determined by the actual state of the case, and not by appearances. That is to say, an infant who is already well provided for in respect to board, clothing, and other articles suitable for his condition, is not to be held responsible if any one supplies to him other board, clothing, etc., although such person did not know that the infant was already well supplied.³ So, on the other hand, the mere fact that an infant, as in this case, had a father, mother, and guardian, no one of whom did anything towards his care or support, does not prevent his being bound to pay for that which was actually necessary for him when furnished. The question whether or not the infant made an express promise to pay, is not important. He is held on a promise implied by law, and not, strictly speaking, on his actual promise. The law implies the promise to pay, from the necessity of his situation ; just as in the case of a lunatic.⁴ In other words, he is liable to pay only what the necessities were reasonably worth, and not what he may improvidently have agreed to pay for them. If he has made an express promise to pay, or has given a note in payment for necessities, the real value will be inquired into, and he will be held only for that amount."⁵

Such also, it is submitted, is the nature of a liability of a husband for necessities furnished a wife whom he has deserted, or compelled to leave him. In such cases it is settled that one furnishing

¹ *Earle v. Reed*, 10 Met. 387.

² 141 Mass. 527, 530.

³ *Angel v. McLellan*, 16 Mass. 28; *Swift v. Bennett*, 10 Cush. 436; *Davis v. Caldwell*, 12 Cush. 512; *Barnes v. Toye*, 13 Q. B. D. 410.

⁴ 1 Chit. Con. (11th Am. ed.) 197; *Hyman v. Cain*, 3 Jones (N. C.), 11; *Richardson v. Strong*, 13 Ired. 106; *Gay v. Ballou*, 4 Wend. 403; *Epperson v. Nugent*, 57 Miss. 45, 47.

⁵ *Earle v. Reed*, 10 Met. 387; *Lock v. Smith*, 41 N. H. 346; Met. Con. 73, 75.

necessaries can recover against the husband therefor, notwithstanding his knowledge at the time he furnished them that the husband did not intend to pay therefor. It is usually stated that the wife in such cases is authorized to pledge the credit of the husband. Since, however, the husband may be liable for necessities furnished even though the wife made no attempt to pledge his credit, — as, for example, for necessities furnished a deserted wife while she is unconscious; — and since, furthermore, the husband is held liable for necessities furnished a wife while he is incapable of contracting, — as where necessities are furnished a wife while the husband is insane,¹ — the better form of statement would seem to be simply that an obligation is imposed by law upon the husband to pay for necessities furnished in such circumstances. That such is the nature of the liability was recognized in *Cunningham v. Reardon*,² where Hoar, J., delivering the opinion holding the husband liable for necessities furnished a wife, said, —

“The husband who by his cruelty compels his wife to leave him is considered by the law as giving her thereby a credit to procure necessities on his account; and is responsible to any person who may furnish her with them. This responsibility extends not only to supplies furnished her while living, but to decent burial when dead. Its origin is not merely and strictly from the law making her his agent to procure the articles of which she stands in need. If it were so, the consequence would follow for which the defendant contends, that the agency would end with the life of the agent. But it is rather an authority to do for him what law and duty require him to do, and which he neglects or refuses to do for himself; and it is applicable as well to supplies furnished to the wife when she is sick, insensible, or insane, and to the care of her lifeless remains, as to contracts expressly made by her.”

On this ground must also be put the obligation of a father, where such obligation is imposed by law,³ to pay for necessities furnished a child whom he has refused to support.

That the right to recover money paid under mistake rests upon a quasi-contractual obligation is a self-evident proposition, when it is remembered that in the typical cases where money is recovered as paid under mistake, the mind of the plaintiff as well

¹ *Read v. Legard*, 6 Ex. 636.

² 98 Mass. 538.

³ *Gilley v. Gilley*, 79 Me. 292; *Cromwell v. Benjamin*, 41 Barb. 558.

as the mind of the defendant was directed, not to the creation of, but to the discharge of, an obligation.

That quasi-contract is the basis of liability where a plaintiff is allowed to sue a tortfeasor in assumpsit is equally clear, since it is the want of assent on the part of the plaintiff that renders the defendant's act tortious. It is idle to speak of the possibility of contract where there is not even the suggestion of a meeting of minds.

That the obligation imposed upon a defendant to refund money obtained by duress, legal or equitable, or upon a judgment subsequently reversed, is quasi-contractual, is evident, since the use of such means to obtain money is utterly inconsistent with an intention to repay it.

Such, of necessity, is the nature of the obligation of a defendant to a plaintiff who has conferred a benefit upon him without request, but in circumstances recognized in law as entitling him to compensation or indemnity therefor.

Such, likewise, must be the nature of the obligation, where though there was a request, and intention to contract, the contract did not come into existence because of the failure of the minds of the parties to meet upon some material term of the contract, or because of the inability of one of the acting parties to make the contract contemplated. Quasi-contractual in its nature necessarily is the obligation of a defendant who, though he has entered into a contract with the plaintiff, and has a perfect defence to any action brought by the plaintiff on the contract, is yet held liable in assumpsit to the plaintiff for value received under the contract.

William A. Keener.

THE CO-OPERATION OF "LAW" AND "EQUITY;"
AND THE ENGRAFTING OF EQUITABLE REMEDIES
UPON COMMON-LAW PROCEEDINGS.

WE have all enjoyed something of the fascinating interest of those chapters in the history of English law which delineate the antagonism and rivalry so long maintained between chancery and the courts of law.

If I am not mistaken, our appreciation of the significance of that contest will be much enhanced by a survey of the present friendly relations between the two systems, which were developed in that contest.

But it is not on that account that I invite my reader's attention to the modern co-operation between law and equity, but rather because the details and the conditions of this co-operation form the greatest complexity in American law, and present many of the most perplexing questions in procedure; and, what is still more important, it is chiefly through the paramount influence which the principles of equity, in the course of this co-operation, are steadily gaining over the traditional rules of the common law that the present remarkable growth of the domain of law goes on.

For the purposes of this outline of the present relations of the two systems it will be convenient to use the terms "law" and "equity" respectively, not merely as indicating contrasting systems of doctrine, nor, on the other hand, merely as different methods of practice, but rather, in the entirety of their characteristic meanings, as each designating one of the two great organized systems of investigation of facts and determination of rights, together with the rights themselves, which, through the long-continued operation of such method, have obtained recognition as a part of our law. My purpose is, by outlining some typical instances of each procedure, with its own results (so far as engaged in this co-operation), to exhibit clearly the nature of the change which is going on, and to show, by some illustrations, how far common-law courts have already got possession of some equity powers, and common-law actions have begun to be modified by the consequent infusion of equitable principles. However strictly a common-law court without equitable powers may be bound to apply

common-law principles in entire disregard of equity, yet as fast and as far as equity powers are conferred upon such a court, it must wield them upon equitable principles whenever the facts are such that a court of equity would do so. In other words, an equitable remedy engrafted upon a common-law action must bear an equitable fruit; and this is the experience of all our courts under the new procedure.

So far as concerns the improvement of the administration of justice in civil cases, the chief gain in procedure in this country during the last fifty years has been in simplifying the co-operation of "law" and "equity" in the manner of which Discovery is a striking instance. The devising and getting into good working order such methods has been a slow process. The time necessary for the bar to become familiar with any such change, and to learn its advantages, has been found to be considerable. Men who knew only the old methods, and were not open-eyed towards the new, were baffled and annoyed. Men who were ignorant of the old took hold quickly of the new, and bungled and floundered about, as they still do. Men who saw in the new a better instrument to do the old work quicker and more thoroughly have made what progress has been made, and have carried the others along with them. In this great movement, complexities often quite serious to the practitioner and to the client have been occasioned, and still continue, by reason of written constitutions and of differences of policy in different jurisdictions. Under such various predetermined constitutional and statutory restrictions it has only been by means of different devices, and what may be called different experiments in different States, that the progress of this co-operation of "law" and "equity" and the transferring of equitable remedies to legal actions has steadily advanced.

Thus regarded, the history of equity may be traced in three chapters: *First*, the contest for supremacy over law; *second*, co-operation with law; *third*, interchange of powers. These three processes occupy successive periods, overlapping each sufficiently to preserve the continuity of the fundamental distinction between the systems. Taken together, they explain the present uncertainty which exists in so many minds as to where that distinction lies; and they point with unerring certainty to a further development of equitable remedies under common-law forms.

If any of my readers have observed with regret the departure from old methods which this change involves, the facts to be here

noted may perhaps bring the conviction that the advance is absolutely irresistible, and that the best as well as the easiest thing to do is to face forward and take advantage of the current. If any are impatient of its slow progress, and would like to wipe out all distinctions between the two systems at one stroke, I would suggest that the distinction between these two great systems not only originated in the nature of the government under which they grew up, but that it fits the different types of men who are concerned in the administration of justice. It is the change in the nature of government which rendered the present progress possible; it is the abundance of men who by temperament and training are excellent common-law judges and attorneys-at-law, but indifferent chancellors and solicitors, and *vice versa*, which makes the progress of the change slow. When the training of the bar shall have become so broad and thorough that the profession generally become fairly apt in both systems, we shall all agree readily in combining the useful features of both in one. If a view of the present situation of the subject will aid any of my readers in these respects, the present purpose will be accomplished.

For the first illustration of the change we are considering, let us take the subject of Discovery. It is perhaps chiefly for its instructive value as an instance of the court of chancery engaged in aiding a suit at law that the Bill of Discovery, although now practically almost obsolete, is allowed so considerable a place in text-books and courses of study.

It may almost be said that in the courts of most of our States the Bill of Discovery is no longer in existence. Even though the power to entertain it remain, the new instrument which the statutes have put into the hands of the common-law courts to take its place is so much more efficient, and so much less dangerous, and commonly so much less expensive, that no one wishes to try a Bill of Discovery if he can help it.

It is not alone the "Code States," so-called, that have abandoned it. Massachusetts has laid it aside almost if not quite as completely as New York. And in the United States Circuit Courts, where the procedure in actions of a common-law nature follows the State court practice, suitors who have occasion to seek Discovery in aid of such an action are embarrassed by their inability to use in that court the simple remedies which in their other practice have been found so much more convenient than the old bill in equity.

The functions of that ancient and ponderous procedure may be thus exhibited:—

ACTIONS AT LAW AIDED BY SUITS IN EQUITY. I. DISCOVERY.

ACTION AT LAW.

EQUITY AIDING PLAINTIFF.

Intending plaintiff at law may, before suing at law, file BILL OF DISCOVERY, to ascertain names of an intended defendant;¹ or for facts or documents to enable to sue.²


ANSWER

by defendant in equity making discovery.

ORDER


(when necessary) that defendant allow inspection of documents.

[NO DECREE.]³

Plaintiff drops his bill, and sues at law. 



WRIT.

DECLARATION.

[Defendant may, before plea, 

[Further proceedings at law may be stayed meanwhile by injunction in equity on defendant's bill of discovery.]⁵

PLEA, &c.

 ISSUE JOINED. 

[Further proceedings at law may be stayed by injunction on either party's bill of discovery.]⁹

TRIAL.

Answer¹¹ or documents produced¹² in chancery, produced as evidence at law.

VERDICT and JUDGMENT.

EQUITY AIDING DEFENDANT.

file a

BILL OF DISCOVERY to ascertain facts or documents to enable him to plead.⁴


ANSWER

by plaintiff at law, who is defendant in equity, making discovery.

ORDER

(when necessary) that plaintiff at law allow inspection of documents.

[NO DECREE.]


Defendant drops his bill  and pleads at law.

Defendant at law may, after issue at law, file BILL OF DISCOVERY to get evidence—documents as well as testimony—to support his case, but not to get his adversary's evidence.¹⁰

ANSWER

by plaintiff at law making discovery.

ORDER


for inspection of documents,  [NO DECREE.]

Plaintiff at law may, after issue at law, file BILL OF DISCOVERY to get evidence—documents⁶ as well as testimony⁷—to support his case, but not to get his adversary's evidence.⁸

ANSWER

by defendant at law making discovery.

ORDER

for inspection of documents, [NO DECREE.] 

Notes of Cases on the Foregoing Procedure.

1. *Heathcote v. Fleete*, 2 Vern. 442. This was a bill to discover owner of lighter, to enable plaintiff to bring an action for damages caused by negligence. [It does not appear whether Fleete was reputed owner or not.]

The necessary relation of the defendant in discovery to the cause of action at law is well stated by Judge Field in *Post v. Toledo & C. R. Co.*, 144 Mass. 341.

2. *Chadwick v. Broadwood*, 3 Beav. 308; s. c. Langd. Cas. in Eq. Pl. 173. This bill alleged that plaintiff was heir-at-law of C, that defendants were in possession of lands which belonged to C, which C was said to have demised to them for a long term; that said term had expired, but defendants refused to surrender. Prayer for discovery of the leases under which defendants held, and receipts and acknowledgments for rent paid, claimed to be in their possession, — without which discovery plaintiff was unable to proceed at law.

But complainant must show he has a cause of action at law. *Mynd v. Francis*, 1 Anstr. 5. This was a bill by one intending to sue as a common informer, under Gaming Act, to discover sums won by defendant; *held*, not to lie, since complainant, not alleging that he had commenced an action at law, had not acquired the character of a common informer under the statute.

3. Chancery has no power to decree relief on a bill of discovery. *Brown v. Thornton*, 1 Myl. & C. 243. Here the Vice-Chancellor's order that defendant in equity, who had made discovery, produce specified documents upon the trial of the action at law, was discharged by the Chancellor, on the ground that this would be giving relief besides discovery.

But it may order such provisional relief as is consequential to the prayer for discovery, as injunction against proceeding at law meanwhile. *Brandon v. Sands*, 2 Ves. Jr. 514.

4. *Lampridaye v. Rutt*, 1 L. J. Ch. 13. Action at law pending to recover for repairs to defendant's house. Defendant filed bill for discovery of the various items making up the sum sued for, as necessary for the purpose of his defence at law, and also prayed an injunction meantime.

General demurrer to bill; argued that bill was in fact a bill for an account; that it was superfluous, as plaintiff at law might be forced to deliver a bill of particulars, and would be obliged to prove the items on the trial at law. Demurrer overruled. (V. C.) "A party to a suit at law may put the other party to his oath in this court as to anything which may enable him to sustain or defend the action, whether it actually turns out to be useful to him or not."

And although the action at law for damages may be based upon an indictable offence, the defendant may have discovery of facts and documents in aid of his defence, especially, it seems, where the defence is a justification. *Macauley v. Schackell*, 1 Bli. N. R. (H. of L.) 96; *Libel*; plaintiff at law ordered to allow inspection of letters, etc.

So, also, where the defence sought to be aided is the illegality of the contract, even though defendant shows himself *in pari delicto*. *Benyon v. Nettleford*, 3 MacN. & Gor. 94. (Contract for future illicit intercourse.)

5. *Macauley v. Schackell*, 1 Bli. N. R. (H. of L.) 96, allowing defendant at law (who was plaintiff in equity) an injunction staying the action at law pending discovery and inspection.

6. *Brandon v. Sands*, 2 Ves. Jr. 514, where the Chancellor sustained a bill by assignees of bankrupt to have discovery of defendant's "books, papers, and writings," relating to the bankrupt's gaming losses, to recover which the assignees had theretofore brought an action at law.

7. *Thomas v. Tyler*, 3 Y. & Colly. 255; s.c. Langd. Cas. in Eq. Pl. 41. Bill alleged death of plaintiff's only witness pending trial, and plaintiff's consequent default; that defendants threatened to move for a nonsuit; that plaintiff could not go to trial without discovery as to specified matters, including conversations between defendants and plaintiff's deceased witness; and prayed discovery and injunction against moving for nonsuit. Demurrer to bill overruled, and answer ordered, with injunction staying proceeding at law.

8. In *Combe v. City of London*, 4 Y. & Colly. 139, 155, which was a bill filed by defendant at law to obtain inspection of the city's records, the Lord Chancellor (Baron Abinger) said: "A party has a right to compel the production of a document in which he has an equal interest — though not equal in degree, yet to a certain extent equal — with the party who detains it from him. In that case he may file a bill for discovery, for the purpose of obtaining such facts as may tend to prove his case; and if those facts are either in the possession of the other party, or if they consist of documents in the possession of the other party in which the other (the applicant) has an interest, or which tend to prove his case, and have no relation to the case of the other party, he has a right to have them produced. . . .

"But has he a right as against the defendant to discover the defendant's case? . . . The ground on which he files his bill is to make the defendant discover what is material to his (the plaintiff's) case; but he has no right to say to the defendant: 'Tell me what your title is; tell me what your case is; tell me how you mean to prove it; tell me what evidence you have to support it; disclose the documents you mean to make use of in support of it; tell me all these things, that I may find a flaw in your title.' Surely that is not the principle of a bill of discovery."

Note that if the evidence desired is material to complainant, it is no defence to a discovery that it is also material to defendant. *Smith v. Duke of Beaufort*, 1 Hare, 507; affirmed in 1 Phill. Ch. R. 209, and *ubi infra*.

9. *Brandon v. Sands*, *supra*, where an injunction was allowed restraining defendants from proceeding to nonsuit at law, pending discovery. And see *Thomas v. Tyler*, *supra*.

10. In *Combe v. City of London*, 4 Y. & Colly. 139, which was a bill filed by defendant at law to obtain evidence in aid of his defence at law, the Chancellor (Baron Abinger) discusses the principles under which the defendant in equity is compelled to disclose evidence in his possession. See quotation from his opinion in note 8.

11. Or an examined copy, where attorney for adverse party admitted the filing of the bill for discovery against his client. *Hodgkinson v. Willis*, 3 Campb. 401.

12. He who made discovery must produce the documents he disclosed, or the one who compelled him to make discovery may give secondary evidence.

In connecting that secondary evidence, if the document was written or signed by his adversary, proof of that fact is sufficient (*Sturge v. Buchanan*, 10 Ad. & El. 598); if it proceeded from a third person, and did not bind the adversary, then the bill and answer, under which defendant was required to disclose it, must be produced to give him the benefit of any explanations which he may have made in his answer respecting it (*Hewitt v. Pigott*, 5 C. & P. 75).

ILLUSTRATIVE INSTANCES OF DISCOVERY AIDING ACTION AT LAW.

1. DUKE OF BEAUFORT *v.* SMITH.

(a) *Action at Law* [not reported]. The Duke of Beaufort brought *assumpsit* against Smith to recover tolls claimed to be due for coals raised by defendant from the duke's lands, by reason of a custom or prescriptive right. Plea: general issue.

(b) *Suit in Equity* [May, 1842] (1 Hare, 507; s. c. Langd. Cas. in Eq. Pl. 571). Thereafter the defendant Smith filed a bill of discovery in aid of his defence to the above action, alleging, among other things, variances from time to time in the rates of toll which had been charged, insisting therefore that the custom claimed did not exist; and alleged certain documents in the duke's possession, consisting of surveys, books, etc., which showed the terms of the alleged custom.

The duke's answer set forth his claim to the tolls, admitted the possession of the various documents, and admitted the variances in the tolls, but denied that they would show the truth of the matters claimed in the bill save as explained in the answer; and further alleged that such documents (annexing a schedule thereof) were his muniments of title, had no relation to any right of complainant, nor were they material to complainant's defence at law, nor had complainant any interest in them.

On complainant's motion, the Vice-Chancellor ordered the production of most of the documents, on the ground that the answer admitted the alleged variance, and therefore the documents showing this variance were evidence of a case complainant had made by his bill.

[November, 1842] (1 Phill. Ch. R. 209; s. c. Langd. Cas. in Eq. Pl. 578). An appeal from this decision was dismissed by the Chancellor (Lord Lyndhurst).

(c) *Action at Law* [1849; reported in 4 Ex. R. (W. H. & G.) 450]. The action at law was then brought on before the full bench on an agreed case, which included excerpts from the documents of which defendant had thus obtained inspection; and the plaintiff at law had judgment.

2. BURRELL v. NICHOLSON.

(a) *Action at Law* [1832] (3 B. & Ad. 649). In trespass against a constable for entering plaintiff's house to distrain for poor-rates, defendant acting on behalf of parish officers, the issue was whether plaintiff's house was within the parish. Plaintiff asked the parish attorney for leave to inspect the parish records to ascertain as to the fact, and on refusal took order to show cause why he should not be allowed to inspect the records, notice of the application being given to parish. The application was denied, on the theory that the applicant must show an interest in the books; but here he disclaimed being a parishioner, and hence disclaimed an interest.

(b) *Suit in Equity* [August, 1833] (1 Myl. & K. 680; s. c. Langd. Cas. in Eq. Pl. 471). Plaintiff, having failed in his application at law (as above), filed a bill for discovery against the vestry clerk and parish officers. The answer of the defendant clerk admitted possession of a number of the documents specified in the bill; and plaintiff moved for an inspection.

The Chancellor, in ordering an inspection, stated that the question being one of boundary, the parish records contained evidence common to both,—the evidence of the title of both; and that the papers being voluminous enough to fill a room, it would be a grievous thing to relegate plaintiff and the court to the feeble aid of a *subpoena duces tecum*, with no previous inspection.

(c) *Action at Law* [December, 1833] (6 C. & P. 202; s. c. 1 M. & Rob. 304). The action at law was then brought to trial; verdict for the defendant, but afterward set aside on motion for new trial.

In many of the State courts of general jurisdiction this process of co-operation of different courts has been superseded by statutes clothing the courts with power to compel the parties to a common-law action to submit to examination, and to produce documents for

inspection, upon a simple motion in the cause. This addition of an equitable power to the resources of common-law courts has been made in different ways and with various limitations. The useful point to notice here is that wherever and however made, it is understood that the common-law court is performing an equitable function; and in all substantial matters affecting the rights of parties, and the privileges of testimony and documents, the common-law court must keep up to the purpose and within the limits marked out by the course and practice in chancery. Another significant fact is that the courts sitting in equity have generally recognized this change as terminating their own function of entertaining bills of mere discovery (save in exceptional instances, where no common-law action within the jurisdiction is pending), and to a considerable extent have ceased, even on bills for discovery and relief, to use their old method in any case where the simpler motion provided for the common-law courts is available in a strictly equitable suit.

For an illustration of this change carried out in a manner more complete, perhaps, than has been yet adopted in most jurisdictions, let us advert to the discovery of testimony and documents under the New York Code of Civil Procedure.

That Code contains an express abolition of suits for discovery in aid of another action or defence (§ 1914). The substitute it gives may be thus outlined:—

EQUITABLE REMEDIES ENGRAFTED UPON LEGAL ACTION.
I. DISCOVERY.

ACTION UNDER NEW YORK CODE.

[The statute requiring United States Circuit Court practice to conform to State court practice as near as may be, does not sanction examination before trial,¹ nor order for discovery of documents² in the Federal court.]

Either expected party in an intended action may, before commencement of an action (by order in the discretion³ of the court), examine the other to perpetuate his testimony.⁴

SUMMONS.

Plaintiff may sue an anonymous or unknown defendant by designating him by a description, and amend after ascertaining name.⁵

After service of summons, plaintiff may (by order of court in its discretion)⁴ examine defendant to learn whom to join as additional defendants,⁶ or to enable plaintiff to frame his complaint,⁷ and may have discovery of documents for like purpose.⁸

COMPLAINT.

Defendant may (by like order) examine plaintiff,⁷ and discover documents to enable defendant to frame his answer.

ANSWER.

Either party may (by like order) examine the other before trial,⁷ and either party may at the trial use the testimony so taken.⁹ Either party may (by the order) have discovery of documents, before trial, for use on the trial.⁸

Notes to Above Procedure.

1. *Ex parte Fisk*, 113 U. S. 713, 723, 725,—holding that, notwithstanding U. S. R. S., § 914, which makes the Circuit Court practice in common-law causes "conform as near as may be" to the State court practice,—a State statute allowing compulsory examination of a party in advance of the trial is not applicable in the Federal court, because U. S. R. S., § 861, requires examination in open court.

Whether testimony can be taken for perpetuation, if shown to be necessary to prevent a delay or failure of justice in a Federal court (113 U. S. 724), or whether testimony so taken in a State court for perpetuation can be read in the Federal court (U. S. R. S. § 867), are different questions.

2. So ruled in the Southern District of New York.

3. *Jenkins v. Putnam*, 106 N. Y. 272.

4. N. Y. Code Civ. Proced., §§ 870, 871. The statute is somewhat broader than the statement above.

5. N. Y. Code Civ. Proced., § 451.

6. *Glenney v. Stedwell*, 64 N. Y. 120; s. c. 1 Abb. (N. C.) 327, with extended note on the practice.

7. *Id.*

8. N. Y. Code Civ. Proced., § 803, etc.; N. Y. Rule 14 of 1888. This practice was introduced by the English common-law courts in view of the fact that the party could then file a bill of discovery, and stay proceedings at law meanwhile; and the New York courts in 1811, and perhaps earlier, adopted (under some restrictions) the same practice where the document was the immediate foundation of the action or defence, or where forgery was alleged. In 1828, on the suggestion that the power was limited, and in many cases doubtful, and that it should be made clearly co-extensive with the well settled power of chancery (3 R. S., 2d ed., 676), the Legislature, by a new provision in the New York Revised Statutes, gave the Supreme Court general power, "in such cases as may be deemed proper," to compel discovery of documents, being governed therein, except in formal details given by the statute, by the principles and practice of chancery (2 R. S. 199, § 21, etc.).

The power was given to other courts by Code Procedure, § 388, Code Civil Procedure, § 803.

9. *Berdell v. Berdell*, 86 N. Y. 519.

It is the better opinion that such statutes making parties competent to testify, and allowing them to examine each other before trial, and to compel production of documents, do not necessarily take away the jurisdiction—that is to say, the inherent power—of a court of equity to compel discovery in aid of another action by bill filed for that purpose;¹ but the existence of the remedy

¹ *Post v. Toledo, &c. R. R. Co.*, 144 Mass. 341,—a very well considered case.

Jacksonville, &c. R. R. Co., v. Peninsula Land, &c. Co. (Fla., 1891), 9 South. Rep. 661, raises, but does not decide, the question.

Shotwell's Exr. v. Smith, 20 N. J. Eq. (Green) 79. *Held*, in 1869, that as the New Jersey statute did not enable the court of law to compel the party to answer, but the only penalty was to stay his proceedings, equity was not deprived of its jurisdiction of a bill to enjoin a suit at law, and compel the cancellation of the fraudulently obtained instrument on which it was brought, and to get discovery in aid of that relief.

given by those statutes practically restrains the exercise of that power in all those cases which are so provided for by the statutes that it can no longer be said that there is no plain, adequate, and complete remedy at law.¹

In other words, the jurisdiction of equity to grant discovery and relief together is not impaired; and its jurisdiction to grant discovery alone in aid of an action at law, it will decline to exercise in those cases where the new procedure gives a plain, adequate, and complete remedy at law. The cases, which have been somewhat inconsiderately arrayed against each other, as if in conflict, are all reconcilable with this principle.

In the New York Code of Civil Procedure there is, as has been noticed, an express provision abolishing suits for discovery merely; but whether under the New York Constitution conferring upon the Supreme Court general jurisdiction in law and equity, it is competent for the Legislature entirely to deprive the court of any recognized branch of its ancient equitable jurisdiction, is at least doubtful. The better opinion is that the statutory prohibition

Union Passenger R. R. Co. v. Mayor &c. of Baltimore, 71 Md. 238 (1889). The statute of 1796,—allowing courts of law to require parties there to make discovery, etc., if they might be compelled to make it in chancery,—*held*, not to take away chancery jurisdiction of a bill for account and discovery of defendant's receipts, on which the city was entitled to a percentage.

Cannon v. McNab, 48 Ala. 99, 102 (to the same effect, on a bill for discovery and account, where equity had concurrent jurisdiction as to the account).

In Hoppock's Exrs. v. United N. J. R. &c. Co. & Penn. R. R. Co., 27 N. J. Eq. (12 Green), 286, 289, plaintiffs sued for a breach of agreement made by the Delaware and Raritan Canal Company; and alleged that after the cause of action accrued that company was consolidated with the Camden and Amboy Railroad Company by an Act declaring them jointly liable, etc., and that subsequently the joint companies were consolidated with the New Jersey Transportation Company under the name of the first above-named defendant, and the former companies ceased to exist; and that the second above-named defendant now held all the property of the first defendant under a lease which assumed the debts, but it denied all liability. *Held*, that the statutes allowing discovery in actions at law did not impair the jurisdiction of equity; for plaintiff was not bound to experiment at law in order to find out who to sue. The validity of the contract was then considered, and the demurrer overruled.

¹ Paton v. Majors, 46 Fed. Rep. 210 (U. S. C. Ct. La., 1891). *s. p.* in Post v. Toledo, &c., R. R. Co. (above cited).

Kearny v. Jeffries, 48 Miss. 343, 358 (1873). (Bill by owner of legal title to have deed delivered for record, and get possession. *Dictum* that equity would not try it as if ejectment. Decree for defendant on the pleadings affirmed on the merits.)

Nor does a statute giving a defendant in equity a right to take the testimony of the complainant deprive him of his right to file a cross-bill, and compel discovery on that cross-bill. Millsaps v. Pfeiffer, 44 Miss. 805. Compare Brown v. Swann, 10 Pet. 497; Heath v. Erie Ry. Co., 9 Blatchf. 319; Rindskopf v. Platto, 29 Fed. Rep. 130.

relates only to aiding by such suits, actions and defences brought or to be brought in the New York courts under the code itself, and does not necessarily preclude an action in the New York courts under the code for discovery to aid a foreign action.

Under the Massachusetts statute, in a common-law action, interrogatories may afford the same aid as a bill of discovery could ;¹ and bills of discovery merely, in aid of common-law actions in the courts of that State, are therefore practically superseded. And the statute of 1883 goes further, by providing in effect that if a bill in equity asks for relief, discovery can only be had by interrogatories as in an action at law.²

The result then may be thus indicated : that notwithstanding the conferring of powers of discovery on common-law courts, equity (unless forbid by a constitution or statute) can still aid a pending or intended action by a bill of discovery, and will do so if the power which might be invoked in the common-law action is not an equally plain, adequate, and complete remedy. If it be such it must be resorted to ; and will be administered by the courts upon the same principles according to which equity proceeds under a bill of discovery.³

For another illustration, let us take the co-operation of equity in staying waste, pending a common-law action, and notice the manner in which the equitable power to do so has been by successive steps allowed exercise on motion in an action of a common-law nature : —

¹ Pub. Sts., c. 129, §§ 46, 53; *Baker v. Carpenter*, 127 Mass. 226 (1879).

² Pub. Sts. 1883, c. 223; *Amy v. Manning*, 149 Mass. 487, 491. See Pub. Sts., 838, c. 151, § 8; *Id.*, p. 971, § 49, etc.

³ *Glenney v. Stedwell*, 64 N. Y. 120; s. c. 1 Abb. N. C. 327, with extended note.

ACTIONS AT LAW¹ AIDED BY SUITS IN EQUITY.

II. STAYING WASTE.

IN EQUITY.

BILL.

SUBPENA.

TEMPORARY INJUNCTION

against waste, pending the action
at law,

*Granted on motion, if a prima
facie case is made out:—*

*Injunction dissolved on motion,
if plaintiff fails at law.*

*Injunction reinstated if plain-
tiff gets order for new trial.*

DECREE

for permanent injunction after
final judgment at law for plain-
tiff,

or, for costs and dismissal of
bill, after final judgment at law
for defendant.

Note of Case Illustrating this Procedure.

ERHARDT v. BOARO, 113 U. S. 527, 537.

Action at Law.—Erhardt, a citizen of New York, sued Boaro and others, citizens of Colorado, to recover possession of a mining claim, from which he alleged defendants had ousted him, and from which they unlawfully withheld possession, to his damage \$50,000.

The second count, repeating the facts, added that defendants removed large quantities of ore, of the value of \$50,000, to his damage; and plaintiff demanded judgment for \$100,000 damages, as well, it seems, as possession.

The defendants claimed title in themselves, and prayed for a judgment of possession and ownership.

Suit in Equity.—Having brought his action for possession, the complainant thereon filed a bill in equity to enjoin the defendants from committing waste pending the action. The bill alleged discovery of claim by plaintiff and his associate, the making of claim,

AT LAW.

WRIT.

DECLARATION.

PLEA.

ISSUE JOINED.

TRIAL

and

VERDICT.

MOTION FOR

NEW TRIAL.

JUDGMENT.

¹ The action at law is usually, if not always, Ejectment, Trespass *q. c.*, or Trespass on the case for Nuisance or for Waste.

the intrusion of defendants, and the ouster of plaintiff, and that complainant had brought his action at law; that meanwhile defendants were working the claim, and prayed for an injunction against their removing ore "until the final determination of the action at law."

The court granted a preliminary injunction.

Trial of Action at Law. — On a trial of the question of title, in the action at law, defendants obtained a verdict and judgment.

Dismissal of Bill in Equity. — In consequence of defendants obtaining judgment at law, the court of equity dissolved the injunction, and dismissed the bill.

Writ of Error at Law. — Complainant brought error to review the judgment at law.

Appeal in Equity. — He also took an appeal to review the dismissal of the bill in equity.

New Trial at Law. — The Supreme Court, after argument of the writ of error in the action at law, held that defendants were not entitled to the verdict, and ordered a new trial for that purpose, reversing the judgment below, and remanding the cause.

Restoration of Injunction. — A new trial having been ordered in favor of the complainant at law, the Supreme Court, upon argument of the appeal in equity, decreed that the bill and injunction must be reinstated.

The opinion in the suit at law was on the merits of the title, and is not material to the present purpose.

Opinion on Appeal from Dismissal of Bill.

FIELD, J., delivering the opinion of the court on the appeal from the dismissal of the bill in equity, and the dissolving of the injunction, says: —

"This is a suit in equity ancillary to the action for the possession of the mining claim, just decided. It is brought to restrain the commission of waste by the defendants pending the action."

After stating the facts, proceeds: —

"It was formerly the doctrine of equity, in cases of alleged trespass on land, not to restrain the use and enjoyment of the premises by the defendant when the title was in dispute, but to leave the complaining party to his remedy at law. A controversy as to the title was deemed sufficient to exclude the jurisdiction of the court. In *Pillsworth v. Hopton*, 6 Ves. 51, which was before Lord Eldon in 1801, he is reported to have said that he remembered being told in early life from the bench 'that if the plaintiff filed a bill for an account and an injunction to restrain waste, stating that the defendant claimed by a title adverse to his, he stated himself out of court as to the injunction.'

"This doctrine has been greatly modified in modern times, and it is now a common practice, in cases where irremediable mischief is being done or threatened, going to the destruction of the substance of the estate, such as the extracting of ores from a mine, or the cutting down of timber, or the removal of coal, to issue an injunction, though the title to the premises be in litigation. The authority of the court is exercised in such cases, through its preventive writ, to preserve the property from destruction pending legal proceedings for the determination of the title. *Jerome v. Ross*, 7 Johns. Ch. 315, 332; *Le Roy v. Wright*, 4 Sawyer, 530, 535.

"As the judgment in the action at law in favor of the defendants has been reversed, and a new trial ordered, the reason which originally existed for the injunction continues.

"The decree of the court below must therefore be reversed, and the cause remanded, with directions to restore the injunction until the final determination of that action; and it is so ordered."

In contrast with this method of co-operation of the different systems, let us notice the improved procedure when the court of common-law jurisdiction is clothed with appropriate equitable powers:—

EQUITABLE REMEDIES GRAFTED ON LEGAL ACTIONS.

II. STAYING WASTE.

COMMON LAW ACTION IN NEW YORK BEFORE THE CODE.

WRIT.

1813. By 1 R. L. of 1813, p. 88, § 29, a tenant of land in controversy was forbidden to make waste, and the common-law courts were directed to keep the land at the suit of the demandant, should the tenant violate the statute.

1830. That Act, which was understood to relate to actions to recover land, was now extended to the action of ejectment for possession, by 2 R. S. 336, § 18, the power of the court now being defined as "power, on the application of the plaintiff, to make an order restraining the defendant from the commission of any further waste thereon."

ACTION UNDER NEW YORK CODE.

SUMMONS.

1849. The Code of Procedure recognized the practice granting injunctions in equity, and introduced provisions allowing them also in common-law actions to restrain acts pending the suit and tending to render judgment ineffectual (§ 219), and left the statutory power to stay waste, by order in ejectment, untouched.

1880. The Code of Civil Procedure, while continuing the provisions as to injunctions (§§ 603, 604), also by § 1681 re-enacted and extended the remedy by order to stay waste by allowing it to be made (even without notice and without security) in all actions, legal or equitable, affecting the title to, or the possession, use, or enjoyment of, real property, and to staying damages of any kind to the property, and this without prejudice to the right to an injunction also in any proper case. The remedy is in its nature an injunction, and the court, or a judge thereof, doubtless may in a single order exercise the power involved in both remedies.

It will be seen from these illustrations that however premature the expectation that law and equity would be "merged" by codes of procedure, and however impracticable such a complete union may appear to many, the assimilation, and to some extent the merger, of procedure is in the full course of progress. It is a curious instance of this that the Massachusetts statute, which was framed to allow ready discovery through machinery added to the common-law actions, for which it was needed, has been found to present so great an improvement over the bill of discovery that, by a later statute, whatever discovery is sought in a bill for relief must be obtained through this new common-law machinery, which, first imitating the equitable remedy for common-law use, has now thus superseded the old machinery of equity even for equity uses.¹ In other words, equity no longer lends its ancient instrument to aid suitors at law, but has been directed to lay it aside even from use in its own causes, and borrow for that use the improvement invented in common-law courts to enable them to get on without the interference of equity.

Austin Abbott.

NEW YORK, May 2, 1893.

¹ *Amy v. Manning*, 149 Mass. 487.

NATIONAL UNIFICATION OF LAW.

THE present official effort to obtain greater harmony or identity of statute law among the States of the Union has been the cause of bringing officially appointed representatives of the several States of the Union together to discuss legal and constitutional questions for the first time since the meeting of the Constitutional Convention itself. In the more than one hundred years that have elapsed since that period, it has been interesting in the conferences of these commissioners to note both how great and how small the changes have been in the characteristics of the several States and in the views of their citizens upon cardinal questions of civilization. So far the progress made by this conference is small; for but few of the States have been represented, and the commissioners have not deemed it wise to proceed rapidly until at least a large majority of the States have come to take part in their debates and their resolutions: as, under our constitutional government, the propriety of enacting uniform laws in the several States must rest wholly either on convenience or on considerations of specific evils resulting from diversity in legislation on certain topics.

It seems clear that it is not within the scope of this movement to obtain, either by national constitutional amendment or by universal State enactment, changes toward uniformity in the fundamental principles of law. The root framework of society must be left to our forty-four independent sovereign States to determine for themselves; and the results of their determination will probably be more instructive, in their very diversity, than any inconveniences fairly resulting therefrom are injurious. But in matters purely formal, — or, perhaps, in matters like divorce, where, from the nature of the case, it is impossible for any one State to legislate finally and effectually, — it is undoubtedly wise to attempt by constitutional principles, that is, by voluntary State action, to obtain uniformity.

The first question, then, in determining whether uniformity of legislation is wise on any particular subject is, whether it is one purely formal, and not one essentially important, — as, for instance, the question of days of grace on bills and notes, or the form of a notarial certificate or protest, — or whether it is part of the legal and social framework of the community, which it has a right to create

for itself, and to hold unchanged without regard to any difference of condition in other States. The best example, perhaps, of this latter kind would be the descent of real estate : the question of who a man's heirs are to be, and in what proportion they are to share his land, being one which each sovereignty may obviously decide for itself over its own domain, without regard to any difference of custom in neighboring territories. On these two extremes most people would be agreed ; but it is in the third or middle class of subjects that the labors of the commissioners on Uniformity of Legislation will excite the greatest criticism, while also it is in matters of this third class that the greatest inconvenience has been felt, and the greatest cause for their action exists. The present movement itself grew largely out of the efforts and agitations of the several State and national divorce and moral reform leagues. There is no subject upon which uniform law has been so much desired, and none in which any definite uniform statute will be so much criticised ; yet, by the statutes creating all these State commissions they were ordered to take up the subject of marriage and divorce ; and some progress, even in these subjects, has been made. The conservative distinction here would perhaps be that so far as the *forms* go, the ceremony or want of ceremony, the perpetuation of evidence of marriage, and so far as the mere procedure, service of process, jurisdiction, and effect of divorce are concerned, a uniform law may hopefully be attempted ; but when it comes to legislation on the *causes* which are sufficient for divorce, on the existence of divorce itself, and the nature and restrictions of the marriage contract, — these matters go too deeply into the essentials of life to be taken out of the regulation of the States for themselves, even by a voluntary and concerted action on their part.

So far only eight States have been represented in the two conferences, or congresses, which have been held of the several State Commissions ; but as many more have already passed statutes creating commissions, and it may fairly be expected that within two years a majority of the States will be represented in the conferences.

The first meeting was held at Saratoga, N. Y., on August 24th to August 26th last. A general order of business was unanimously adopted ; namely, that the Conference should begin by taking up the more simple matters, — as far as possible, matters purely formal, — and afterwards proceed to the more substantial. Upon this

order the question of acknowledgments to deeds and notarial certificates was taken up first. It was admitted that all the States of the Union require a deed to be properly acknowledged or proved as a preliminary to record, and that some States require acknowledgment or witnesses as a requisite to the validity of the deed itself. But this latter being unusual, it was disregarded by the Conference, which contented itself with attempting to draw up one form of acknowledgment which should be recognized as valid throughout the States of the Union, even though it might be additional to forms already recognized in some of the States. What was wanted was one universal form which any lawyer throughout the Union would recognize as sufficient in the State where a deed sent to him was executed, and dispense him from making further inquiry into the laws or customs of that State. It was held not sufficient merely to recommend that an acknowledgment, when valid, where taken, should be valid in other States; because the whole practical difficulty lies in determining whether an acknowledgment is sufficient in the foreign State where it was taken. As a result of their debates on this subject, the Conference adopted the forms which are printed at the end of this article, based on a set which had previously been recommended by the American Bar Association. A bill legalizing these forms will probably be introduced at the next meeting of the Legislature of every State in the Union.

It may be interesting to note the principal matters which aroused debate on this and other points. In the form of acknowledgment as recommended, the word "free" aroused the particular animosity of one of the delegates from New York. He argued that when a man said an instrument was his act and deed, it was just the same as to say it was his free act and deed, and that the general principle which should govern the labors of law reformers was to reject surplusage. Nevertheless, it was held that the word "free," being contained in the form of acknowledgment of the vast majority of the States, and having got itself pretty well into the minds of the people in this connection, the advantage of greater conciseness was not sufficient in this instance to make it worth while to leave the word out. So, "free act and deed" it remains, as far as the labors of this Conference could make it.

The next question which aroused discussion was, whether it would be wise to establish some officers as having power to take acknowledgments and proofs of deeds throughout the Union. The

Massachusetts Commissioners were of impression that notaries public, being already universally entitled to take protests of bills and notes, and being throughout most of the civilized world the officers specially charged with authenticating foreign deeds or evidence, it would be a convenient rule to establish this one officer as the general one who would always have authority to take acknowledgments of deeds, and to provide that his seal should sufficiently authenticate his certificate of acknowledgment, without further certificate of clerks of court or other functionaries.

The New York Commissioners objected to this on the ground that notaries were plenty as blackberries in that State, and almost equally wild; and gentlemen from the South objected that notaries in their States were very commonly unprovided with seals. So, after full debate, the form was adopted as printed below, by which the one universal rule is, that any officer duly authorized in the State where he takes the acknowledgment may do so, and his certificate be recognized as valid everywhere, provided it be further certified to by the Secretary of State, or a clerk of a court of record, with seal, stating that the officer had such authority and that his handwriting is genuine.

The Conference were unanimously of opinion that there should be no separate examination required in the case of deeds by married women; and this recommendation was adopted, although, perhaps, going farther than the others in the direction of modifying substantive law; but the whole tendency of State legislation is in the direction of putting married women precisely on a par with men in all particulars of powers and property; and it was doubted whether the separate examination afforded much real protection against domination by the husband, — the general opinion being that where the gray mare was not the better horse, she would not suddenly become so because left alone in a room with a magistrate.

Some debate was had on the question of allowing one of several grantors to acknowledge the instrument sufficiently to entitle it to be recorded with effect against all of them; but upon this point it was found that the laws of the States, as well as the interpretation of their statutes by their several courts, differed so much that it was not wise to deal with it at present.

The form of the seal aroused a discussion which bore more fruit. It is obvious that there are two questions concerning seals liable to be confounded. One is, What shall be the nature or form of a seal itself to make it valid as a seal? The second, What shall be the

legal consequence when it is valid as a seal? The Southern and Western delegates were generally in favor of abolishing the use of the seal entirely. All the commissioners were in favor of making its use as easy as possible by any method which would clearly indicate that the use of the seal was intended. As a result, either the word "seal" or the letters "L. S.," written or printed on the paper, were made sufficient; but the Conference were not willing to allow a mere scroll, or scrawl of the pen, for the reason that in such cases it is impossible to tell whether an ordinary signature with a flourish is meant to be a signature with a seal, or a mere paraph.

It may be shown, and it is the fact throughout the United States, that there are three different ways of treating the question of seals: one, to abolish them entirely; one to make them necessary to certain instruments; and a third, to make them merely the sign, dispensing with any inquiry into consideration. In some Western States the statute is adopted that all written instruments shall be presumed to have consideration, which would seem to put written instruments in the place of sealed instruments at the common law. After some debate the conference decided not to go into this matter at this time, but to content itself with merely recommending the form of the seal, leaving the consequences to be what they might be in the several States.

It will be seen that as a result of these recommendations, if adopted as laws, the whole matter of the form and execution of deeds would be made clear and uniform throughout the United States. None of the present forms or methods would be rendered invalid in the States where they are now legal; but any lawyer throughout the country would have at his fingers' ends one method which at least would be valid, and would cover every possible point of the execution, form, and authentication of deeds.

The corresponding question relating to wills the Conference did not go into further than to recommend as a universal law that which is already law in most States, that a will executed without any State, either in the mode prescribed by the law of the place where executed, or of the place where the testator lived, shall be deemed to be legally executed, provided only it be in writing and subscribed by the testator; and further, that any will duly proved where the testator lived, may be proved in any other State by exemplified copy and record of such probate, without any original proof; and shall then have the same effect as if originally proved and allowed in such State.

One notices that there may be a question here. In States where a will proved is absolutely valid after the time of appeal has elapsed, this statute reaches further than in States where probate of a will is at all times only presumptive evidence as affecting the title of real estate. Nevertheless, the statute proposed would seem to leave this law where it found it, only making foreign probate of the same effect as it had in the State; although unquestionably it thereby prevents attacks upon the validity of the will, which might otherwise be had in the State where proved in the second instance. Nevertheless, the statute is one of great convenience, is already generally adopted, and would seem to be fair; as the law of the testator's domicile, which should properly govern, is by it made to govern.

On the subject of *bills and notes*, the Conference contented itself with recommending the abolishing of all days of grace, and attempting to make the rule universal that notes falling due on Sundays and holidays should be payable and presentable on the secular day next succeeding such holiday; this seeming a fairer rule to the debtor than the one now prevailing in many States. Nevertheless, it is probable that the former suggestion will be slow of adoption, although it is demonstrable that the days of grace do not benefit the debtor, and tend to confuse the transaction by mistakes and errors of computation, and also make much additional work and book-keeping for banks. There is so strong a notion that something is to be gained by a debtor in saying that he borrows money for sixty and three days instead of borrowing it for sixty-three days, that it will share the difficulty of all prejudices in being removed. In fact, the bill embodying this recommendation has already been defeated at least in the Legislature of Massachusetts.

The Conference had now left its merely formal matters, and got down to serious business, when it touched the subject of marriage and divorce. As all shades of opinion are doubtless represented in the United States, from those who would have no marriage, those who would have it an ordinary civil contract, revocable like other civil contracts by consent of both parties, to those who would have it a sacrament, a state or a finality, so most of these opinions were represented in the Conference. The only subject upon which the Conference really agreed was that it should at least be made perfectly clear in every State what a marriage is, when it happens, and how its evidence shall be perpetuated.

The special point about which the tide of discussion ebbed and

flowed was the so-called "common-law marriage," or Scotch marriage,— marriage by consent, marriage *de facto*, or, as the extreme conservatives would call it, marriage which is not marriage at all. A strong general prejudice in the South and West in favor of making marriage as easy as possible was met by an equally strong determination in the North and East that people who were getting married should understand and realize the fact at the time; and that so important an event in a man's life should at least leave behind it some trace which could be a test to his collateral heirs, his descendants, his widow, and most particularly to his later alleged wife. Gentlemen from metropolitan New York appeared most in dread of adventurers of the gentler sex, while gentlemen from the chivalric South were much more troubled with the conduct of designing males. The common-law marriage, or marriage by mere cohabitation, was declared ingrained in the manners of the people of one section of the country, while the necessity of a church ceremony, or at least some civil act adequately representing it in formality, was declared equally a corner-stone of the civilization of the Puritans. It was, perhaps, a depressing inference to draw that the chief anxiety of our older civilization appeared to be how to avoid marriage, while that of the newer country was rather how most easily to incur it. It may well be imagined that the Conference wisely abstained from recommending anything radical on the subject. Recognizing the impossibility of keeping the sexes entirely apart (which would undoubtedly be the easiest method of disposing of the difficulty), the Conference only endeavored to devise a means of making the parties clearly state under what relation they came together. The result will be found in the recommendations printed below. It was strenuously declared—and this at least seemed to meet the general approval—that a person who incurred the obligation of marriage should surely be required to go through the same formality required of him when he obligated himself for goods and merchandise to a greater value than ten pounds sterling. The chivalry of the commissioners carried them unanimously, and without demur on the part of any member, as far as the secretary is advised, to this point: that a wife was at least of the value of fifty dollars. Accordingly, it was declared that a marriage without minister, ceremony, or witnesses, without bell, book, and candle, without record and without acknowledgment, should at least be evidenced by a scrap of paper signed by both parties; that the question, if it ever came to trial,

might be transferred to the simpler studies of forgery rather than the complex investigations of what Solomon termed the ways of a man with a maid. And the New England delegates further carried their point to the extent of getting a recommendation, in the form of statute, to all the States that provision be made for the immediate record of marriages, however solemnized, or when not solemnized at all, — it being held by them that the question of matrimony was of greater general importance even than that of the proper ownership of an acre or so of wild land. These matters were pretty unanimously passed; but when the much-vexed question of the age of consent, so-called, arose, there was, after the most heated debate, very far from a decided vote upon the question. Many of the commissioners were unwilling to touch upon the subject at all. Others said that they were particularly charged by their State Legislatures to take action upon this, and that on no other one thing was there so great a public expectation that something should be done. Attention was duly called to the fact that the very words, “age of consent,” may mean entirely different things, according as the statutes or laws of a State regard the breach of this provision. For instance, it makes very much difference whether an attempted marriage between parties, one of whom is under the age of consent, is declared to be no marriage at all, even when followed by the birth of children, or whether it merely subjects the elder party to a sort of judicial reprimand, or renders the magistrate or clergyman liable to a five-dollar fine, or enjoins upon him the duty of not marrying them unless papa or mamma be present.

The Conference recognized this difference, but still decided that they could not presume to go into the manner in which separate States interpreted their own regulations; and the debate was limited to the fixing of the age of consent, without deciding what the term meant. All classical literature would appear to show that the age of consent, from the Garden of Eden down, would necessarily and solely mean that age at which the lady in fact consented; and certainly the descendants in all cases would strenuously stickle for that theory, it being equally in accordance with common-sense, the Bible, and the manners of the most polite courts. Nevertheless, all the States of this country, and indeed the common law (only the common law puts it, in all conscience, young enough), have established an age of consent. The common law takes the liberal latitude of anything above twelve and fourteen. Now there

is undoubtedly a very earnest desire on the part of many of our best people — many of those whose wishes are most to be considered in matters of this sort — that the common-law rule should be made less liberal. Probably no one would wish to put it higher than eighteen or twenty-one; but from this down there are many opinions for all possible ages.

As a result, the Conference suggested the age of eighteen in the male, and sixteen in the female. Undoubtedly there are climatic reasons for not making this rule the same in all parts of the country; nevertheless, the difficulty of establishing a sort of Mason-and-Dixon's line on the ability to marry will be obvious to the most flippant observer. The recommendation, as a recommendation, does no harm; but the reader will probably think that it had better stay a recommendation, that the several States, while perhaps increasing the common-law age, should nevertheless be left to determine such precise needs as their own experience warrants, and that in all States no marriage should be impeached for nonage which is followed by the birth of a child. One may apprehend in all seriousness that this matter cannot be settled by this country or in this generation. This is not saying that it is not well to agitate it and improve the laws where we see them at fault, — notably in matters of divorce; and on this point it is hoped that the divorce statutes printed below will gradually commend themselves to the good sense of the community. They will prevent what is undoubtedly the greatest abuse now, namely, the procuring of divorces easily and without publicity in foreign States, which have no proper jurisdiction, and without notice to the defendant party, who is usually, in such cases, the innocent party. But it would seem that the question of marriage is one which not only varies at any one time in different sects, in different communities, in different civilizations, and in different races, but is one upon which any one community is not at a point of stable equilibrium. Unquestionably this most important relation is undergoing a change, — a change at least in the point of view from which it is regarded, if not in the statutes embodying it. Democracy, the modern view of property, the other modern movement, — which only began with Mary Wollstonecroft in the early part of this century, and is known as the emancipation of women, — is certainly, in its last result, not going to leave the relation of the sexes where it found it. And, yet, so far, there has been on the statute book very little change. All the debates of conferences such as

this, while interesting, — as the conversation of any intelligent person must be on this subject, — are nevertheless entitled to little more consideration than — perhaps not so much as — that great unconscious public sentiment, which does not rise to that point of conscious intellectual consideration, but which, behind the manners and movements of mankind, dominates the action of humanity, creates society, and only afterwards appears in laws and statutes.

F. J. Stimson.

APPENDIX.

FORMS OF BILLS RECOMMENDED, AND RESOLUTIONS ADOPTED.

Acknowledgment and Execution of Deeds.

AN ACT RELATING TO ACKNOWLEDGMENTS OF WRITTEN INSTRUMENTS

(Enacting Clause.)

SECTION 1. Either the forms of acknowledgment now in use in this State, or the following, may be used in the case of conveyances or other written instruments, whenever such acknowledgment is required or authorized by law for any purpose: —

(Begin in all cases by a caption specifying the State and place where the acknowledgment is taken.)

1. In the case of natural persons acting in their own right:—

On this day of 18 , before me personally appeared A B (or A B and C D), to me known to be the person (or persons) described in and who executed the foregoing instrument, and acknowledged that he (or they) executed the same as his (or their) free act and deed.

2. In the case of natural persons acting by attorney:—

On this day of 18 , before me personally appeared A B, to me known to be the person who executed the foregoing instrument in behalf of C D, and acknowledged that he executed the same as the free act and deed of said C D.

3. In the case of corporations or joint-stock associations:—

On this day of 18 , before me appeared A B, to me personally known, who, being by me duly sworn (or affirmed), did say that he is the president (or other officer or agent of the corporation or association) of (describing the corporation or association), and that the seal affixed to said instrument is the corporate seal of said corporation (or association), and that said instrument was signed and sealed in behalf of said corporation (or association) by authority of its Board of Directors (or trustees), and said A B acknowledged said instrument to be the free act and deed of said corporation (or association).

(In case the corporation or association has no corporate seal, omit the words "the seal affixed to said instrument is the corporate seal of said corporation (or

association), and that," and add, at the end of the affidavit clause, the words "and that said corporation (or association) has no corporate seal.")

(In all cases add signature and title of the officer taking the acknowledgment.)

SECTION 2. The acknowledgment of a married woman when required by law may be taken in the same form as if she were sole, and without any examination separate and apart from her husband.

SECTION 3. The proof or acknowledgment of any deed or other written instrument required to be proved or acknowledged in order to enable the same to be recorded or read in evidence, when made by any person without this State and within any other State, Territory or District of the United States, may be made before any officer of such State, Territory or District authorized by the laws thereof to take the proof and acknowledgment of deeds, and when so taken and certified as herein provided, shall be entitled to be recorded in this State, and may be read in evidence in the same manner and with like effect as proofs and acknowledgments taken before any of the officers now authorized by law to take such proofs and acknowledgments, and whose authority so to do is not intended to be hereby affected.

SECTION 4. To entitle any conveyance or written instrument, acknowledged or proved under the preceding section, to be read in evidence or recorded in this State, there shall be subjoined or attached to the certificate of proof or acknowledgment, signed by such officer, a certificate of the Secretary of State of the State or Territory in which such officer resides, under the seal of such State or Territory, or a certificate of the clerk of a court of record of such State, Territory or District in the county in which said officer resides, or in which he took such proof or acknowledgment, under the seal of such Court, stating that such officer was, at the time of taking such proof or acknowledgment, duly authorized to take acknowledgments and proofs of deeds of lands in said State, Territory or District, and that said Secretary of State, or Clerk of Court, is well acquainted with the handwriting of such officer, and that he verily believes that the signature affixed to such certificate of proof or acknowledgment is genuine.

SECTION 5. The following form of authentication of the proof or acknowledgment of a deed or other written instrument when taken without this State and within any other State, Territory or District of the United States, or any form substantially in compliance with the foregoing provisions of this Act, may be used.

Begin with a caption specifying the State, Territory or District, and county or place where the authentication is made.

I, _____, Clerk of the _____ in and for said County, which Court is a court of record, having a seal (or I, _____, the Secretary of State of such State or Territory), do hereby certify that _____ by and before whom the foregoing acknowledgment (or proof) was taken, was, at the time of taking the same, a notary public (or other officer) residing (or authorized to act) in said county, and was duly authorized by the laws of said State (Territory or District) to take and certify acknowledgments or proofs of deeds of land in said State (Territory or District), and further that I am well acquainted with the handwriting of said _____ and that I verily believe that the signature to said certificate of acknowledgment (or proof) is genuine.

In testimony whereof, I have hereunto set my hand and affixed the seal of the said Court (or State) this _____ day of _____, 18 .

SECTION 6. The proof or acknowledgment of any deed or other instrument required to be proved or acknowledged in order to entitle the same to be recorded or read in evidence, when made by any person without the United States, may be made before any officer now authorized thereto by the laws of this State, or before any minister, consul, vice-consul, chargé d'affaires, or consular agent of the United States resident in any foreign country or port, and when certified by him under his seal of office it shall be entitled to be recorded in any county of this State, and may be read in evidence in any Court in this State in the same manner and with like effect as if duly proved or acknowledged within this State.

AN ACT RELATING TO THE SEALING AND ATTESTATION OF DEEDS AND OTHER WRITTEN INSTRUMENTS.

(Enacting Clause.)

SECTION 1. In addition to the mode in which such instruments may now be executed in this State, hereafter all deeds and other instruments in writing executed by any person or by any private corporation, not having a corporate seal, and now required to be under seal, shall be deemed in all respects to be sealed instruments, and shall be received in evidence as such, provided the word "Seal," or the letters "L. S." are added in the place where the seal should be affixed.

SECTION 2. A seal of a court, public officer or corporation may be impressed directly upon the instrument or writing to be sealed, or upon wafer, wax, or other adhesive substance affixed thereto, or upon paper or other similar substance affixed thereto by mucilage or other adhesive substance. An instrument or writing duly executed in the corporate name of a corporation, which shall not have adopted a corporate seal, by the proper officers of the corporation under their private seals, shall be deemed to have been executed under the corporate seal.

SECTION 3. No attesting witness shall be necessary for the due execution of any deed or other written instrument conveying lands or any interest therein, provided the same be duly acknowledged. But, in case the same has not been acknowledged, one attesting witness to such instrument shall be sufficient for the validity thereof, and for proving the same for record.

The following resolutions were adopted on the subject of Marriage and Divorce:—

Marriage.

"RESOLVED, that it be recommended to the State Legislatures that legislation be adopted requiring some ceremony or formality, or written evidence, signed by the parties, and attested by one or more witnesses, in all marriages; provided, however, that in all States where the so-called common-law marriage, or marriage without ceremony, is now recognized as valid, no such marriage, hereafter contracted, shall be valid unless evidenced by a writing, signed in duplicate by the parties, and attested by at least two witnesses.

"RESOLVED, that we recommend to the several Legislatures further to provide that it shall be the duty of the magistrate or clergyman solemnizing the marriage to file and record the certificate of such marriage in the appropriate public office.

"RESOLVED, that in cases of common-law marriages, so called, evidenced in writing, as above provided, it shall be the duty of the parties to such marriage to file or cause to be filed such written evidence of their marriage, in an appropriate public office, within ninety days after such marriage shall have taken place, and that a failure so to do shall be a misdemeanor.

"RESOLVED, that it be further recommended to the legislatures that in case the certificate last mentioned be not filed as aforesaid, or if no subsequent ratification by both parties, evidenced as aforesaid by like writing, be filed, then neither party shall have any right or interest in the property of the other.

"RESOLVED, that we recommend to all the States that stringent provision be made for the immediate record of all marriages, whether solemnized by a clergyman or magistrate, or otherwise entered into, and that said provisions be made sufficiently stringent to secure such record and the full identification of the parties."

The following resolution, passed at the meeting of the Conference held at Saratoga, was re-adopted, viz.:—

"That the age of consent to marriage should be raised to eighteen in the male, and sixteen in the female."

Divorce.

"RESOLVED, that it is the sense of this Conference that no judgment or decree of divorce should be granted unless the defendant be domiciled within the State in which the action is brought, or shall have been domiciled therein at the time the cause of action arose, or unless the defendant shall have been personally served with process within said State, or shall have voluntarily appeared in such action or proceeding.

"Where the defendant shall not be domiciled in the State in which such action is brought, or shall not have been domiciled therein at the time the cause of action arose, the plaintiff must prove either that the parties have lived together in that State as husband and wife, or that the plaintiff has in good faith resided in said State for at least one year next preceding the commencement of the proceeding.

"RESOLVED, that it is the sense of this Conference that in all libels for divorce for adultery with some person named therein, such person shall be made a co-respondent, and personal service of the libel shall be made upon such person, unless it appear to the Court that such service was impracticable.

"RESOLVED, that where a marriage is dissolved, both parties to the action shall be at liberty to marry again."

It was also resolved that the Legislatures of the States be recommended to pass laws in conformity with the foregoing resolutions.

Wills.

AN ACT RELATING TO THE EXECUTION OF WILLS.

(Enacting Clause.)

FIRST. A last will and testament, executed without this State in the mode prescribed by the law, either of the place where executed or of the testator's

domicile, shall be deemed to be legally executed, and shall be of the same force and effect as if executed in the mode prescribed by the laws of this State ; provided said last will and testament is in writing and subscribed by the testator.

AN ACT RELATIVE TO THE PROBATE IN THIS STATE OF FOREIGN WILLS.

(Enacting Clause.)

FIRST. That any will duly admitted to probate without this State, and in the place of the testator's domicile, may be duly admitted to probate and recorded in this State by duly filing an exemplified copy of said will and of the record admitting the same to probate ; and such will shall then have the same force and effect as if originally proved and allowed in this State.

Bills and Notes.

AN ACT AS TO PROMISSORY NOTES, CHECKS, DRAFTS, AND BILLS OF EXCHANGE.

(Enacting Clause.)

FIRST. That all promissory notes, checks, drafts and bills of exchange shall hereafter be due and payable as therein provided, without days of grace being allowed.

SECOND. That all promissory notes, checks, drafts or bills of exchange that shall fall due on Sunday or any other legal holiday, shall be payable and presentable for payment on the secular or business day next succeeding such Sunday or holiday.

Weights and Measures.

The following is the table of weights and measures recommended by the Conference at Saratoga, as amended at the meeting held in New York City:

1. The avoirdupois pound to bear to the troy pound the relation of 7,000 to 5,760. The hundredweight to contain 100 of avoirdupois pounds, and the ton 20 hundredweight.
2. The barrel to contain $31\frac{1}{4}$ gallons, and the hogshead two barrels.
3. The dry gallon to contain 282 cubic inches; the liquid gallon 231 cubic inches.
4. The bushel in heap measure to contain 2150.42 inches.
5. A barrel of flour measured by weight shall contain 196 pounds ; a barrel of potatoes, 172 pounds.
6. The bushel of wheat to contain 60 pounds.
The bushel of Indian corn, or of rye, 56 pounds.
The bushel of barley, 48 pounds.
The bushel of oats, 32 pounds.
The bushel of corn meal, 50 pounds.
The bushel of rye meal, 50 pounds.
The bushel of peas, 60 pounds.
The bushel of potatoes, 60 pounds.
The bushel of apples, 48 pounds.
The bushel of carrots, 50 pounds.

- The bushel of onions, 57 pounds.
- The bushel of clover seed, 60 pounds.
- The bushel of herdsgrass, or timothy, seed, 45 pounds.
- The bushel of bran and shorts, 20 pounds.
- The bushel of flax seed, 55 pounds.
- The bushel of coarse salt, 70 pounds.
- The bushel of fine salt, 50 pounds.
- The bushel of lime, 70 pounds.
- The bushel of sweet potatoes, 54 pounds.
- The bushel of beans, 60 pounds.
- The bushel of dried apples, 25 pounds.
- The bushel of dried peaches, 33 pounds.
- The bushel of rough rice, 45 pounds.
- The bushel of upland cotton seed, 30 pounds.
- The bushel of Sea Island cotton seed, 44 pounds.
- The bushel of buckwheat, 48 pounds.

WHY IS A MASTER LIABLE FOR THE TORT OF HIS SERVANT?

THE principle upon which the law treats one who wrongfully injures another as responsible therefor in damages, is easily accounted for. It bears a close analogy to that reasonable provision which requires that A when he has deprived B of property, shall restore to B the property itself, or its money equivalent. In cases, however, where a defendant is proceeded against because of acts done, or duties neglected, by his servant, the true ground of liability is not so readily capable of ascertainment. Where a servant's act may with perfect propriety be taken to be that of the master himself, the reason is plain enough for casting the latter in damages. But we soon approach a border-line where the conduct of the servant is altogether his own, — the master neither being present, nor, as a matter of fact, countenancing in the slightest degree the act of his servant, — and yet the master is held to a rigid accountability, and made to respond in damages, as for his own fault or neglect. The rule of liability in such cases may be concisely stated as follows: For all acts done in the execution of the master's business, within the scope of the servant's employment, and resulting in the infliction of injury, the master is responsible.

It is the design of this article very briefly to inquire into the reasons why this rule, which is now so firmly intrenched in the law, was originally formulated. Our purpose is to explore, and, if it may be, to discover upon precisely what principle the rule is grounded. Of course, it is conceivable that a rule may work well in practice, and yet that when traced to its origin, it will be found to rest upon no logical foundation. It is seldom unprofitable to keep steadily in mind the reason of a rule, in order that, if for nothing else, we may at least make sure that the rule itself, whatever may be its justification, shall not under new conditions be extended beyond just and salutary limits.

The profession is well aware to what extent the present generation of lawyers is indebted to the labors of O. W. Holmes, Jr. (now Mr. Justice Holmes, of the Massachusetts bench), in tracing

legal rules and forms of actions to their origin, and thus throwing needed light upon the law as to-day administered. In the opening chapter of "The Common Law" (Boston, 1881), that learned and acute writer tells us of the growth of the doctrine of master and servant; of the pecuniary responsibility assumed by the master for the purpose of securing the surrender to him of the body of his slave, held by an injured party as a *thing* responsible for the injury committed. "The principle introduced on special grounds in a special case, when servants were slaves, is now the general law of this country and England; and under it men daily have to pay large sums for other people's acts, in which they had no part, and for which they are in no sense to blame" (page 16).

It may be permitted to us to remark how refreshing it has proved after our own unaided attempt at ascertaining by a process of speculative thought why, upon principles of fairness and justice, there should in this class of cases be *imputed* to a master a blame that in reality has no existence, to come across the passage just quoted. Taken with its context, it serves to explain how such a rule has gradually come to be incorporated into what is now the law of England and America. The reason for the maintenance of the rule, if not for its origin, I am fain to believe, however, should be sought for in an entirely different direction.

If a gentleman be negligent in his choice of a servant, or if he keep a servant in his employ whom he knows to be heedless, and an accident occurs, the rule that he should be made to respond in damages needs not to be explained. The present inquiry is restricted to the case where no such neglect can, as a matter of fact, be charged against the master, — to the case, in other words, where negligence is displayed on the part of the servant *for the first time*. Why should the master be held liable?

Let us take a case in concrete form. For this purpose let us select as an illustration the familiar instance of a carriage. You are a man of means, we will suppose, and you have in your employ a coachman. He came to you well recommended, and has for three or four years proved himself faithful to your interests. You justly regard him as an intelligent, sober, and prudent man; and you have never hesitated to intrust to him the safety of your children, or guests. One day, he is driving your carriage to the railroad station to meet you. While on his way he drives over a pedestrian, and severely injures him. The person injured is not to blame; the driver is. *For the first time* your coachman is

careless, and guilty of neglect; for, by the exercise of proper caution, he might have avoided the casualty.

Your coachman is a frugal man, and has laid up a few hundred dollars in the savings-bank. The injured man's attorney either does not suspect this to be so, or else he rightly conceives that your bank account can much better stand a strain upon it, and you are confronted by a suit. Now, upon what ground of justice and fairness ought you to be compelled to pay damages?

It is conceded that you are not morally to blame. You did nothing to bring about the occurrence of the accident. You had omitted no duty in respect to it. You owned the carriage and the horses. An ingenious mind prompts the suggestion that it was by your order that the offending driver was at that particular spot at that moment of time. The visible instrument by which the injury was inflicted was yours.

The act was not wilfully done. As will sometimes happen, the man "lost his head," and for his neglect you must pay.

We are told, first, that the coachman at the time was acting in the course of your employment. Had the use of the carriage been given him so that he was driving, not for you, but for his own purposes, you would not have been liable. Being engaged about your business, and for your benefit, you must take the consequences. It is not contended that the master *causes* the servant's action; but the rule of law is to be maintained that what the servant does here within the scope of his employment is presumed to be done under the master's orders.

Perhaps as comprehensive an exposition of the grounds of this liability as can readily be cited is found in the following language of Lord Cranworth, in a leading case,—language which, according to a late text-writer on the subject, furnishes "a very pointed and excellent illustration of the rule:"—

"If a servant driving his master's carriage along the highway carelessly runs over a bystander, or if a game-keeper, employed to kill game, carelessly fires at a hare so as to shoot a person passing on the ground, or if a workman employed by a builder in building a house negligently throws a stone or a brick from a scaffold, and so hurts a passer-by, — in all these cases (and instances might be multiplied indefinitely) the person injured has a right to treat the wrongful act as the act of the master. *Qui facit per alium, facit per se*. If the master himself had driven his carriage improperly, or fired carelessly, or negligently thrown the stone or brick, he would have been directly responsible; and the law does

not permit him to escape liability because the act complained of was not done with his own hand. He is considered as bound to guarantee third persons against all hurt arising from the negligence of himself or of those acting under his orders, or in the course of his business. Third persons cannot, or at all events may not, know whether the particular injury complained of was the act of the master or the act of the servant. A person sustaining injury in any of the modes suggested has a right to say: I was no party to your carriage being driven along the road, to your shooting near the public highway, or to your being engaged in building a house. If you chose to do or cause to be done any of the acts, it is to you, and not to your servants, that I must look for redress, if mischief happens to me as their consequence. A large portion of the ordinary acts of life are attended with some risk to third persons, and no one has a right to involve others in risk without their consent."¹

An obvious criticism for one to make who is searching for the reason of the rule is, that all this is very well put, but it discloses no *reason*. It goes no deeper than to state what is the law.

To be sure, it does not follow that there is not a reason because Lord Cranworth fails to bring it forward. But a similar disappointment awaits the inquirer, we think, in trying to get at the bottom of other decisions on this subject. Lord Brougham, for example, is reputed as saying in *Duncan v. Findlater*:²—

"I am liable for what is done for me and under my orders by the man I employ, for I may turn him off from that employ when I please; and the *reason* that I am liable is this, that by employing him I set the whole thing in motion, and what he does, being done for my benefit and under my direction, I am responsible for the consequences of doing it."

There is really no causal connection between the order given by the master to drive to the station, and the injury inflicted by the driver's neglect; so that the expression, "set the whole thing in motion," does not help us very far toward a solution of the question. Moreover, to say that what the coachman does is done for the benefit of his employer, is not true, so far as it is meant to apply to the coachman's committing a tort. It is true that the servant is prosecuting a duty in his master's behalf, and that in a sense he represents his master; but the latter has done nothing, nor has he sanctioned the doing of anything, to the injury of the third person.

¹ *Bartonshill Coal Co. v. Reid*, 3 McQ. 266, quoted by Wood, in his "Master and Servant," p. 526.

² 6 Cl. & F. 910.

Charging him with the fault of the servant, therefore, is a purely arbitrary act of the law. It may perhaps find its justification in that refuge to which courts at times have found themselves obliged to resort, namely, public policy and convenience.

Underneath the surface of this expression, "for the master's benefit," there seems to be lurking the thought that whatsoever a servant does with intent to further his master's interest must be considered as if done by the master's previous order; and hence that all results attendant upon the servant's manner of doing it are to be treated precisely as if the master had actually caused those results to be brought about. This is, of course, pure assumption. One may say that it is an assumption laid hold upon in order to support a fancied theory of causal connection between the inanimate instrument that figures in the transaction, and the innocent but unlucky owner who, though corporally absent, is treated as legally present.

A discovery of the true reason why liability is imposed upon the party whom in these cases we term "master" would appear to be left, not to research into the reports of the earlier decisions, but to our insight into human nature, and our perception of the springs of human action. With due deference to the conclusions of others, who from time to time may have sought to work out this problem, we venture to suggest the following solution, that certainly has much in its favor.

The rule may be attributed to the influence that our feelings of sympathy have over us for a fellow-being in distress. We cannot look upon the unfortunate victim of an accident without being sensible, not only of pity for him, but of more or less indignation and resentment against the person whom we take to be the party in fault. A brewery wagon injures a child. The crowd blame the driver. The sight of a name upon the wagon awakens a feeling against the company. In every instance, upon viewing the servant and the work in which he is engaged, the transition is an easy one over to the employer. Though not present to the senses of the beholder, he is readily pictured in imagination, and associated with his servant as deserving of the severest censure.

Following close upon this thought, if not the parent of it, is a vague feeling that the injury must be fully repaired. He who robs a man of his sound limb and good health ought to pay roundly for it. The damage has come through human agency. Some man, or men, must make it good. In a confused way (our feelings

getting the better of our judgment) we reach a conclusion that all that human means can accomplish must be brought to bear to alleviate suffering, — to repair an injury that ought never to have been inflicted. The "master" being more or less connected in our thoughts with the affair, and being moreover a man able to respond with his money, we quickly determine that it is only right that he should assume the responsibility of what we easily call his share in the accident. We see no hardship in making him pay the bills, and we leave him to console himself with the reflection how much better off he is than the poor fellow who has been injured.

Reducing this sentimental process to its standard of logical value, we perceive that, as a judicial reason, it is worthless. Viewing it as an impulse or a conviction to determine how men should treat each other, we find it irresistible.

If this attempt to account for the rule in question shall appear to the reader to be strained and far-fetched, perhaps he may suggest a simpler and more convincing explanation. The employment of servants in this country has grown in every direction with the wonderful development of our resources. Whatever may be the true ground for imposing upon employers this burden of liability, it is well to bear in mind the origin of the rule, that in new cases constantly arising it may be pushed no farther than a sound public policy and a keen sense of impartial justice shall clearly warrant.

Frank W. Hackett.

NOTE. — The reader who is disposed to pursue the inquiry further may consult a chapter on Employers' Liability in Sir Frederick Pollock's "Essays on Jurisprudence and Ethics" (London, 1882), pp. 116, 131; also, two articles on *Agency*, by Mr. Justice Holmes, HARVARD LAW REVIEW, vol. iv. p. 345, and vol. v. p. 1; and the "Reports to the House of Commons of the Select Committee on Employers' Liability for Injuries to their Servants." The reports are printed in the Parliamentary Blue Books for the years 1876 and 1877. Of special application is the testimony of Bramwell, J., Report, 1877, pp. 58, 59, and of Brett, J., pp. 115, 119; also the views of Joseph Brown, Q. C., Report, 1876, pp. 38, 41, 44; and those of R. S. Wright, — now Mr. Justice Wright, — pp. 47, 51.

These references, it is proper to say, were unknown to us while we were putting into shape the suggestions as above presented. The friend who has kindly furnished them takes occasion to remark, pertinently enough, "It would be a real service to the profession to get them to read the testimony in the Blue Books, where judges 'let themselves out' more than in court." Possibly it is not too much to hope that the substantial portions of what at least the justices have said before the committee may be reprinted some day in this country in a form readily accessible to bench and bar.

F. W. H.

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THE LAW SCHOOL.—As readers of the REVIEW are aware, during the past eighteen months the entrance requirements of the Law School have been somewhat stiffened, and a series of new regulations have also been adopted, to prevent the return for another year of men who have made a comparative failure. These measures were in line with the general policy of the School, but they were hastened by the need of checking immediately its increase in size, which threatened to outgrow the accommodations of Austin Hall. It is not probable that the numbers for 1893-94 will in any event be greater than those of the present year, — or, indeed, as great. But there is no reason to believe that the School has reached its permanent maximum. To forestall the future, therefore, the Faculty have just announced a further and more radical change in the requirements, not only for entrance, but for the degree.

The effect of the preceding changes was virtually to legislate special students out of the catalogue; for as much will henceforth be demanded from them, in order either to enter or stay, as has been demanded under the present system from regulars. The new rules, by restricting the class eligible to the degree, bring the special students back again in name, though it is needless to say that the name will not mean what it once did. This restriction of the degree does not take effect, however, until 1897; that is, it does not apply to men entering next autumn.

After 1896, the following men only can be candidates for the degree:

(1) Holders of an academic degree from any one of a specified list of about eighty colleges, — this list being made up of colleges which have hitherto fed the School, together with a few obvious additions, and being liable to change from time to time. The object of the rule is simply to ensure a certain minimum of general education among graduates of the Law School; and the list is provisional, in the sense that any man who could show that his degree represented in general not less than that minimum, would probably be admitted.

(2) Men who are qualified to enter the Senior Class in Harvard College. This is necessary, in order to provide for the increasing number

who wish to combine the last year in college with the first in the Law School. On January 1, 1893, there were twelve such in the class of 1895.

(3) Special students who are three full years in residence, and who, before applying for the degree, make up the deficiency in their entrance requirements.

(4) Special students who are three full years in residence, and who receive an average mark for their whole course within five per cent of that required for the Honor Degree. This is at present seventy-five per cent, and, judging from the recent action of the Faculty, will probably not be changed.

The following will be eligible for admission as special students :—

(1) Men who hold an academic degree from any college not on the list mentioned above.

(2) Graduates of any law school which requires a two-years' course, and gives its degree upon examination.

(3) Men who pass the present entrance examination.

It is pretty clear that these changes will succeed in their immediate purpose of bringing down the attendance at the School. Judging from the results of the similar experiment of requiring a three-years' course, it does not follow, however, that this effect will be permanent, — nor need it be. It is to be hoped that the resources of Austin Hall will some time be enlarged.

When the present demands upon Austin Hall are repeated, there is no reason why the building should not be better able to meet them. At all events, the immediate emergency has only hastened, not altered, the evolution of the School. Its steady policy has been to keep its standards as high as was possible at the given moment under the general conditions of legal education. On the continent of Europe, it should be remembered, and even in some parts of Spanish America, a liberal education is an absolute prerequisite to the beginning of study for the bar.

THE Faculty have also passed two votes of less importance. The privilege of re-examination, in order to obtain better marks, has been abolished. It is understood, however, that an exception may be made in cases of illness; and the Faculty will probably not decline to consider special cases, coming up by petition, upon their merits. In the second place, absolutely no information will be given in regard to marks beyond that which is contained in the report sent at the end of the year to each student.

No other changes of any importance are as yet announced for next year. The *personnel* of the Faculty and the course of instruction will apparently remain as at present; and there will be no alterations in Austin Hall. The lectures on Patent Law, announced for this year by Mr. Fish, but unavoidably prevented, will be given next year.

VISITORS at the World's Fair will find the Law School well represented there, — thanks to Professor Thayer and Professor Ames, the Committee of the Faculty having the matter in charge. The Harvard exhibit, of which this is a part, is most admirably placed among the other colleges. The Law School sends the photographs of the building; graphical charts, showing the growth of the Library, the funds, the instruction, and the number of students; portraits of Nathan Dane, Judge Story, Professor

Greenleaf, Professor Parsons, Chief-Justice Parker, and Professor Washburne; and a complete set of the first and last editions of the different books published by instructors during their connection with the School. The Harvard exhibit is in the so-called "Hall of Liberal Arts," and will remain under the personal charge of Mr. Williams, the Publication Agent of the University.

THE LAKE FRONT CASES AGAIN. — The REVIEW is indebted to Merritt Starr, Esq., '81, of the Chicago bar, for a valuable criticism of the note in the March number concerning the Lake Front Cases (146 U. S. 387). Mr. Starr says in part: "Your note seems to reflect unfavorably upon the opinion of the court. Among other things it contains the following: —

"The decision must be that any large grant of the kind is a license revocable by the Legislature whenever in the judgment of the court such interpretation would largely promote the pecuniary welfare of the people; for it is here only pecuniary welfare that is affected; the community saves what constitutional confiscation would cost."

"The fundamental character of the decision leads me to hope that you will permit me, as an alumnus of the Law School, to indicate briefly some reasons for believing that this is an inaccurate interpretation of the decision.

"In the opinion Mr. Justice Field says: 'That the State holds the title to the lands under the navigable waters of Lake Michigan, within its limits, in the same manner that the State holds title to soils under tide water, by the common law, we have already shown; and that title necessarily carries with it control over the waters above them whenever the lands are subjected to use. But it is a title different in character from that which the State holds in lands intended for sale. It is different from the title which the United States hold in the public lands which are open to pre-emption and sale. It is a title held in trust for the people of the State, that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein, freed from the obstruction or interference of private parties. . . . A grant of all the lands under the navigable waters of a State has never been adjudged to be within the legislative power; and any attempted grant of the kind would be held, if not absolutely void on its face, as subject to revocation.'

"This is hardly an admission of a power to grant such property.

"The difference shown by the court between property in lands *held for sale* by the State, and land which is *not held for sale* by the State, is most important.

"The lands acquired by the United States from other Governments were acquired by grant, and lie in grant, — they are made the subjects of barter and sale, and held for the purpose of sale. But the title and dominion of the Government over the harbors of the realm, and over the submerged lands of the harbors, was not acquired by grant, and does not lie in grant. The title of the people of a State in such harbors and lands is not derived. It is incidental to and inherent in the sovereign people of the State. It has such title and dominion independent of the ownership of adjacent lands. It is a portion of the royalties belonging to the Government, and held in trust for public purposes, of navigation and fishery. (*Hardin v. Jordan*, 140 U. S. 381; *Martin v. Waddell*, 16 Pet. 367-410; *McCready v. Virginia*, 94 U. S. 394, 395; *Union Depot Co. v. Brunswick*, 31 Minn. 303; *Smith v. Maryland*, 18 Howard, 75; *Providence*

Engine Co. v. Steamship Co., 12 R. I. 348, 356; *Pollard's Lessee v. Files*, 2 How. 591; *Weber v. Harbor Commissioners*, 18 Wall. 57.)

"Under these rules of law no grant of this property could have validity except in carrying out the purposes of the trust in such property; and the designation of a public agency for accomplishing such public purposes can be changed from time to time. This has been repeatedly held by the same court. In *East Hartford v. Hartford Bridge Co.*, 10 How. 511, 534, it is said: —

"One of the highest attributes and duties of a Legislature is to regulate public matters with all public bodies, no less than the community, from time to time, in the manner which the public welfare may appear to demand.

"It can neither *devolve these duties permanently on other public bodies*, nor permanently suspend or abandon them itself. . . .

"It is bound also to *continue to regulate such public matters and bodies* as much as to organize them at first.

"Where not restrained by some constitutional provision, this power is inherent in its nature, design, and attitude; and the community possesses as deep and permanent an interest in such power remaining in and being exercised by the Legislature, when the public progress and welfare demand it, as individuals or corporations can, in any instance, possess in restraining it."

"The court held that the franchise in that case was not a contract protected by the Constitution, not only because the town which held the franchise of the public was a municipal and political corporation, but because in granting the franchise the Legislature was acting 'in relation to a public object, being virtually a highway across the river over another highway up and down the river.' And the court say that whatever in the nature of a contract could be considered to exist in such a case, there must be implied in it a condition that the power still remained, or was reserved, in the Legislature to modify or discontinue the privilege in the future as the public interests from time to time seem to require.

"The argument for the Railway Company seeks to justify the grant of public right to the Railway Company, on the ground that it is a public corporation, and on the ground of the public character of the grant, and then claim for the grant the protection of private contracts, on the ground that the Railway Company is a mere private corporation. The grant cannot be so justified without, by the same argument, removing it from the protection of private contracts.

"Your note states that the arguments of the minority are very hard to escape; that the power to grant such land, the minority of the court reason, is admitted by the majority, and that it is difficult to say by what principle the extent of the grant is to be limited, as that is a matter of legislative discretion, having regard to the reasonable connection of the means to the end; and that it is impossible to say that the amount of land granted in this case is absurdly beyond the needs of a great railroad for its terminal facilities.

"The difficulty with this position and with the dissenting opinion of Judge Shiras seems to me to be, that the granting of land for terminal facilities for a railroad is not the proper purpose to which to devote the public waters of the State and the submerged lands thereunder, in promotion of the trust on which it is held; so that the needs of a great railroad for its terminal facilities is not a fair test of the reasonableness of

the extent of the grant. An examination of the former holdings of the court I think will remove the difficulty that the writer of the note discovers. The principle laid down in *Terrett v. Taylor*, 9 Cranch, that a legislative grant is not revocable, must be held to apply to that which is properly the subject-matter of such a grant, *e. g.*, public lands held for sale. Else the integrity of our institutions might be very seriously impaired if whatever of public right the Legislature should see fit to make the subject of a grant is to be held to be beyond recall.

"There are some things which the Legislature cannot permanently grant away; its title to the harbors of the country is one."

EVIDENCE — ADMISSION OF DECLARATIONS TO PROVE THE INTENTION OF THE DECLARANT. — The recently decided cases of *Commonwealth v. Trefethen*, 31 N. E. Rep. 961 (Mass.), and *Siebert v. People*, 32 N. E. Rep. 431 (Ill.), show a curious divergence of authority. In both cases the question was the same, and the decision diametrically opposite. Both were indictments for murder, and in both the defendant, to establish the defence of suicide, offered in evidence statements made by the deceased to third parties that he intended to kill himself. In both, the lower court excluded the evidence, and the case came up on the defendant's exceptions. The Illinois court sustained the ruling below, on the ground that to make such statements admissible they must accompany and qualify some act which would itself be admissible, — must be part of the *res gestæ*. In their decision they cite with approval the Massachusetts case of *Commonwealth v. Felch*, 132 Mass. 22.

On the other hand, in *Commonwealth v. Trefethen*, the Massachusetts court expressly refused to follow its earlier decision, and sent the case back for a new trial, laying down the rule that in any case where a man's intention is provable, his declarations, made at or about the time when such intention is alleged to have existed, are admissible.

In its present form the rule of the Massachusetts court is a novelty; but it is foreshadowed in several classes of cases where intention or some other mental state has been in issue. Bankruptcy cases, where it was material to prove that the bankrupt had acted with intent to defraud his creditors, *Rawson v. Haigh*, 9 J. B. Moore, 217, and cases where the validity of a will was attacked on the ground of insanity, *Waterman v. Whitney*, 11 N. Y. 157, afford instances of the admission of direct statements of intention. In general, these and similar decisions have proceeded on the *res gestæ* ground, even where, as in *Lake Shore Ry. v. Herrick*, 29 N. E. Rep. 1052, it is most difficult so to explain them; or the declarations have been regarded as "verbal facts" themselves evidential, *Chase v. Lowell*, 151 Mass. 422; or they have been let in, as in *Du Bost v. Beresford*, 2 Camp. 511, without any clear indication of the reason for their admission. So in speeches showing that the speaker thought himself dying, admitted as a foundation for dying declarations, the evidence seems to have been let in as a matter of course. *Commonwealth v. Cooper*, 5 Allen, 495, 497; *Commonwealth v. Haney*, 127 Mass. 455; *Rex v. Spilsbury*, 7 C. & P. 187; 1 Greenleaf, § 187.

The first case containing a clear and explicit statement of the rule was *Mutual Ins. Co. v. Hillmon*, 145 U. S. 285, in which, to prove that a man left Wichita on a certain day, the Supreme Court allowed his letters writ-

ten a short time before to be put in to show that it had been his intention to do so. These letters might have been admitted as part of the *res gestæ*; but the opinion, by Mr. Justice Gray, proceeds on the broad ground that "whenever the intention is of itself a distinct and material fact in the chain of circumstances, it may be proved by contemporaneous, oral, or written declarations of the party."

Cases like this and *Commonwealth v. Trefethen* establish an exception to the Hearsay rule. There is a clear distinction between such statements as are here admitted, and involuntary cries or exclamations, whether of pain or pleasure, the admissibility of which has long been recognized. These are let in because they are involuntary, the direct effect of physical and mental conditions whose presence they indicate, as smoke indicates the presence of fire. It is true they can, like almost all natural effects, be produced by art so as to mislead; but this is so difficult, and so rarely done with success, that the possibility is ignored. When, however, words voluntarily spoken and fully subject to the will of the speaker are admitted, this reasoning ceases to apply, and we are dealing with what the Illinois court very justly calls "mere hearsay." The exception, if justifiable, is so on two grounds,—first, because the statements are so near to the mental fact which they are offered to prove that the objection; to hearsay are reduced to a minimum; and second, because facts of this class are so difficult of proof by any other means that in the interests of justice it becomes necessary to let in the evidence.

A later Massachusetts case, *Viles v. City of Waltham*, 32 N. E. Rep. 901, suggests as a possible qualification of *Commonwealth v. Trefethen* that declarations by a party to the suit shall not be received in his favor "unless made under such circumstances as give them some corroboration, such corroboration being found, as a rule, in the fact that they accompany and explain acts which would themselves be competent evidence." Logically, this qualification is not necessary, for the objection to the statements as hearsay being done away with, and the modern practice allowing parties to testify in their own favor, it would seem that their declarations should be equally admissible with those of third parties. But to get a good working rule there is much to be said for the suggestion, the adoption of which would, by removing the danger of admitting statements made with a deliberate purpose to use them as evidence, greatly diminish any objection to the Massachusetts doctrine.

With or without qualification, the Massachusetts law seems better law than the Illinois, which is likely to work grave injustice in many cases, as it has perhaps done in *Siebert v. People*, where the accused was deprived of the means of proving what might in a doubtful case have appeared to the jury a material fact. These statements proved at least that the thought of suicide was present to the mind of the deceased shortly before his unexplained and violent death.

ERRATA.

SIR FREDERICK POLLOCK has made the following corrections of his article on "Contracts in Early English Law," vol. VI. HARVARD LAW REVIEW, page 393, line 18: for "buyer" read "seller;" *id.*, page 396, note 6, for "deviation" read "derivation."

RECENT CASES.

ADMIRALTY — CONSTRUCTION OF STATE STATUTE GIVING MARITIME LIEN. — A Michigan statute subjects vessels at their home port to a lien for "supplies furnished for the use of such water craft." *Held*, that this must be construed to be limited to supplies furnished on the credit of the vessel. *The Samuel Marshall*, 54 Fed. Rep. 396 (C. Ct. of App., Mich.).

The argument of the court is, that although such liens may be created by State statute, they are maritime in their nature, and within the exclusive jurisdiction of the United States courts; and that the United States courts, under their admiralty jurisdiction, will enforce such liens only under the limitations to which maritime liens of the same class are regularly subject. This would be equally true, whether or not such a result could be reached by fair construction of the statute. But it is also to be presumed that the Legislature, in creating the lien, meant to give it the usual characteristics of maritime liens. The case overrules an earlier decision in the same circuit. *The Illinois White and Cheek*, 2 Flip. 383.

ADMIRALTY — MARITIME LIEN GIVEN BY STATE STATUTE — JURISDICTION OF STATE COURTS. — A statute of Illinois (Rev. Stat. of 1874, c. 1, § 1) makes all steamships subject to a lien for supplies furnished at their home port. A United States statute (Rev. Stat. § 492) provides that no mortgage of any vessel of the United States shall be valid except against the mortgagor, etc., unless such mortgage is registered at the office of the collector of customs of the home port. *Held*, that the lien given by the State statute is maritime; that as such, it is within the exclusive admiralty jurisdiction of the United States courts; that the latter are therefore not bound as to this case by the local law of Illinois; and that a maritime lien, even though created by a State statute, takes precedence of a prior mortgage duly recorded under the United States Registry Act. *The J. E. Rumbell*, 13 Sup. Ct. Rep. 408.

The decisions in Illinois, and in the United States circuit of which Illinois forms a part, — all of which are here overruled, — have gone consistently the other way upon the last point. Elsewhere the trend of recent authority is strongly in accord with the present decision. Upon the second point, the decision is of course irreconcilable with the very recent Massachusetts case of *Atlantic Works v. The Glide*, 33 N. E. Rep. 163, and 7 Harv. Law Rev. 163.

AGENCY — LIABILITY OF SUB-AGENT TO PRINCIPAL — CUSTOM AMONG STOCK-BROKERS. — The plaintiff, who lived in Canada, sent through X, a country stockbroker, to defendants, a London firm, a power of attorney issued to one of the defendants, authorizing him to sell some New Consols which stood in the plaintiff's name. The defendants sold them, and applied the proceeds to offset a balance in their favor on their account with X. X subsequently went into bankruptcy, and the plaintiff, who had not learned until then that the sale had been made, applied to the defendants for the proceeds, which they refused to hand over. *Held*, that the custom among stockbrokers did not justify the defendants in applying the proceeds of the plaintiff's consols to cover the deficit in the account of X; and that the plaintiff could recover the entire amount, excluding brokerage. *Crossley v. Magniac* (1893), 1 Ch. 594 (England).

The decision may be said to hinge on the custom which prevails among stockbrokers. Regarding the powers of a bank to deal with the proceeds of a note transmitted to it for collection, see 1 Daniel, Neg. Inst. 3d ed. §§ 337-340.

BILLS AND NOTES — PROVISION IN MORTGAGE TO DECLARE DUE BEFORE TIME OF MATURITY. — Several promissory notes were given in the usual form, due at specified future dates, and secured by a single mortgage, containing a stipulation at the end that, if default should be made in any of the prior provisions, it should be lawful for the mortgagee to declare the whole sum above specified to be due. One note coming due and being unpaid, the holder brought suit upon all the notes before the date of their maturity, alleging that he elected to declare the notes to be due. *Held*, that the provision in the mortgage did not make it possible to sue upon the notes before their regular times of maturity, but that plaintiff's only remedy was to foreclose the mortgage, which he could do in accordance with the provision. *White v. Miller*, 54 N. W. Rep. 736 (Minn.).

The few courts which have decided this question have reached opposite conclusions. The leading case in accord is *McClelland v. Bishop*, 42 Ohio St. 113 (1884). Perhaps the best case *contra* is *Chambers v. Marks*, 93 Ala. 412 (1891); s. c. 9 So. Rep. 74. One written contract inconsistent with the terms of another written contract may well furnish a good equitable defence when suit is brought upon the latter; but it is not so

easy to see how a plaintiff can sue upon one contract, and recover in accordance with the terms of another. It is reforming the contract upon which he sues, and recovering upon it at the same time.

CONSTITUTIONAL LAW — EMINENT DOMAIN — COMPENSATION FOR DIVERSION OF PERCOLATING WATERS. — Congress authorized the construction by the United States of a tunnel to provide the city of Washington with water, and provided that any person who should be "directly injured in any property right" by the construction of the tunnel should receive compensation. The well of the plaintiff below, situated 500 feet from the right of way, was deprived by defendant's works of the supply of percolating water which had hitherto soaked into it and filled it. *Held*, that under the Act of Congress, plaintiff was entitled to compensation. *United States v. Alexander*, 13 Sup. Ct. Rep. 529.

The court refuse to be bound by the well-known cases (see *Acton v. Blundell*, 12 M. & W. 324), in which an action of tort is held not to lie in favor of one landowner against another for diverting the water which customarily percolates into the plaintiff's well. Reliance is chiefly placed upon a series of Massachusetts decisions (3 Cush. 107; 144 Mass. 139), in which compensation was allowed for a similar injury under a statute which covered all "damages occasioned by" the work under construction. But (1) it is doubtful whether the Massachusetts cases are not an innovation. There can hardly be damage in a legal sense unless there is a right which can be damaged; and the gist of *Acton v. Blundell* is that no right to percolating water exists. And (2) even if "damage" in these cases be construed in a popular sense, a similar construction of "direct injury to property rights" in the present case is far more difficult.

CONSTITUTIONAL LAW — INTERSTATE COMMERCE — TAXATION. — An ordinance of St. Louis provided that "all telegraph companies which are not by ordinance taxed on their gross income for city purposes, shall pay to the city of St. Louis, for the privilege of using the streets, alleys, and public places thereof, the sum of five dollars per annum" for every telegraph pole used by them. Defendant resisted on the ground that this was really a license tax imposed for the privilege of carrying on interstate commerce. *Held*, — Brown, J., *dissenting*, — that the United States Circuit Court erred in ruling that the ordinance was void upon its face as imposing a license tax for the privilege of doing business, and in directing judgment for defendant. A new trial was ordered. *City of St. Louis v. W. U. Tel. Co.*, 13 Sup. Ct. Rep. 485.

The case was tried below without a jury, and came up upon a record which the court treat as somewhat informal. It does not appear with sufficient clearness what facts were before the court, to speak with absolute confidence of the meaning of the decision. The majority hold (1) that plaintiff can exact a reasonable rental from defendant for the use of its streets; (2) that such appears upon the face of the ordinance to have been intended; (3) that there are not sufficient facts before the court to enable it to say that the amount of the charge is so unreasonable as to make it void; but (4) that such an objection will be open to defendant upon the new trial. Brown, J., dissents upon the third point, on two grounds: first, that the court should take judicial notice that five dollars a pole is an unreasonable charge; second, that the same is proved by the fact that the annual sum assessed under the ordinance amounted to forty-four per cent of the entire valuation of defendant's property in St. Louis, — arguing from these facts that it was a mere pretence to call such a charge compensation for use of the streets, and that it was therefore void *in toto* as a tax on interstate commerce. It does not appear with certainty whether the majority considered the second of the above facts as being before the court. The decision is interesting, especially when compared with *Maine v. G. T. R. R.*, 142 U. S. 217, as showing the recent tendency of the Supreme Court to interpret the commerce clause of the United States Constitution less strictly against the States.

CORPORATIONS — SUBSCRIPTION TO CORPORATE STOCK — RIGHTS OF SUBSCRIBER. — *Held*, that when an active, organized corporation increases its stock, a subscriber for this new issue of stock does not by the mere fact of subscription become a stockholder; and he is not entitled to a certificate of stock, or to a beneficial interest in the corporation, until he has paid at least a part of his subscription. *Baltimore City Pass. R. R. v. Hambleton*, 26 Atl. Rep. 279 (Md.).

The court distinguish the cases of the formation of a corporation, and of an increase of stock by an existing corporation; they hold that in the latter case a subscription for stock is merely an agreement to become a stockholder, and they cite with approval *Gould v. Oneonta*, 71 N. Y. 298, and *St. Paul, etc. R. R. v. Robbins*, 23 Minn. 440. Morawetz finds fault with these cases, following out his view that a corporation is distinctly an aggregation of individual persons who have contracted to form a corporate association, and that membership is a kind of status arising at once from the formation of this contract, 1 Morawetz, Priv. Corp. §§ 44-46, 54, 61.

CRIMINAL LAW — CONSPIRACY TO OBSTRUCT UNITED STATES JUSTICE — IMPUTED INTENT. — An indictment under U. S. Rev. Stat. § 5399, alleged that defendants were employees of B. Mining Co.; that in proceedings in equity instituted by B. Co. in the United States Circuit Courts, the Miners' Union of Wardner, an organization of which defendants were members, was enjoined from intimidating other employees of B. Co.; that while the injunction was in force, defendants did nevertheless conspire to intimidate, and did intimidate, other employees of B. Co.; and that thereby defendants committed the offence of conspiring to obstruct the administration of justice in the courts of the United States. *Held* (Brewer and Brown, JJ., *dissenting*), that it was error to overrule a motion to quash the indictment, — which was defective on its face in failing to aver that defendants had been properly served with notice of the injunction, and also in failing to aver that the object of the conspiracy was the obstruction of Federal justice. *Pettibone et al. v. United States*, 13 Sup. Ct. Rep. 542.

The ground of the decision is that there must be an intent, actual or imputed, to obstruct the administration of Federal justice; that this intent cannot be implied from allegations which do not show that defendants knew that Federal justice was being administered; and that such an intent cannot be imputed from the mere fact that defendants were engaged in an unlawful conspiracy. Conspiracy, by itself, is an offence against the State alone; and the intent to violate State law does not carry with it by legal implication the intent to violate the law of another jurisdiction. On the latter point, Brewer and Brown, JJ., dissent, holding that the present decision is inconsistent with *In re Coy*, 127 U. S. 731.

CRIMINAL LAW — MANSLAUGHTER — NEGLECT TO PROVIDE FOOD. — The prisoner, a woman of full age and without means of her own, lived with and was maintained by the deceased, her aunt, a woman of seventy-three. For the last ten days of her life the deceased suffered from a disease which prevented her from moving or doing anything to procure assistance; during this time the prisoner lived in the house, and took in the food supplied by the tradesmen, but apparently gave none of it to the deceased; nor did she inform any one of the condition of deceased, although she had abundant opportunity to do so. No one but the prisoner had any knowledge of the condition of deceased prior to her death, which was substantially accelerated by want of food. *Held*, that a duty was imposed upon the prisoner under the circumstances to supply the deceased with sufficient food to maintain life; and as the death of the deceased had been accelerated by neglect of such duty, the prisoner was properly convicted of manslaughter. *The Queen v. Instan* [1893], 1 Q. B. 450.

There is no English case exactly in point; it is interesting to compare this case with *Rex v. Smith*, 2 C. & P. 449, where it was held that one who merely allows an idiot brother to remain under his roof, is under no duty to provide him with food or medical attendance, and with *Reg. v. Shepherd*, Leigh & C. 147, cited by counsel for prisoner, where it was decided that where a mother neglected to procure the services of a midwife for her daughter, and for want of them the daughter died, the mother could not be convicted of manslaughter. The case under discussion is much stronger than the idiot brother case, owing to the relations between the parties, the prisoner being maintained entirely by the deceased; and under these circumstances it was properly left to the jury to find an implied undertaking by the prisoner to give food and nursing to deceased. The duty to furnish food rests principally, however, on the fact that deceased paid for the food which the prisoner took in.

DAMAGES — MENTAL SUFFERING. — The plaintiff in this case was allowed to recover for the sense of humiliation and wrong suffered by being wrongfully ejected from a train. *Willson v. Northern Pacific R. R. Co.*, 32 Pac. Rep. 468 (Washington).

This case follows the rule adopted by the great weight of authority, that a "sense of insult or indignity, mortification, or wounded pride, is a subject for compensation." 1 Sedgwick on Damages, § 67.

EVIDENCE — HEARSAY — ENTRIES IN REGULAR COURSE OF DUTY. — To prove that no train was passing a certain point at a certain time, defendant gave in evidence entries in its train-despatcher's records. The entries were made as follows: When a train passed any station on the line, it was the duty of the telegraph operator at that station to send to the train-despatcher's office at the starting-point of the road a statement of the time at which the train passed. It was the duty of the receiving operator at the train-despatcher's office to enter these statements on a regular blank; and the despatcher relied on these entries in controlling the movements of the trains. These entries were accompanied by the testimony of the receiving operator, but the operator who sent the messages could not be found. *Held*, that these entries were properly admitted. *Donovan v. Railway*, 33 N. E. Rep. 583 (Mass.).

The cases relied on by the court as authorities for this decision, are all distinguish-

able from the principal case by the fact that it does not appear that the persons making the entries had no personal knowledge of the facts recorded. In *Mayor of New York v. Railway*, 102 N. Y. 572, entries made by a foreman from the oral reports of subforemen were admitted, but they were accompanied by the testimony of the subforemen. Therefore, if the Massachusetts court had adhered to the usual practice of strictly excluding any hearsay for the admission of which there is no precedent, this evidence would have been kept out. But it is submitted that no objection can properly be taken to the extension of this exception to the rule against hearsay evidence to a case like this, where, though the entries were not made by one having personal knowledge of the facts, they were the basis for the performance of so responsible a duty.

EVIDENCE — PHYSICAL EXAMINATION OF PLAINTIFF IN PERSONAL INJURY SUIT. — Plaintiff sued a city for an injury received by a fall occasioned by a defective sidewalk. The attorney for the city requested plaintiff to remove her glove and show her injured hand to the jury; also to exhibit her injured arm to a physician for examination; she refused, and the trial judge declined to require her to do it. *Held*, that this was error. The court say that it evidently would not have been a shock to plaintiff's sense of delicacy to have done as requested, and the court should have compelled submission. *Graves v. City of Battle Creek*, 54 N. W. Rep. 757 (Mich.).

The line of cases in accord starts with *Schroeder v. Chicago, &c. Railway*, 47 Iowa, 375 (1877); that case was generally followed, especially in the Western and Southern States, until 1891, when the Supreme Court of the United States came to an opposite conclusion in a well-considered case, two justices dissenting. *Union Pacific Railway v. Botsford*, 141 U. S. 250. This case was followed by *McQuigan v. Delaware, &c. Railroad Co.*, 129 N. Y. 50 (1892), and *Pennsylvania Co. v. Newmeyer*, 129 Ind. 401 (1892). With the principal case following the old doctrine, in a State where the question was unsettled, it is not easy to foresee what will be the future course of decision. The older cases are collected in a note to *Sidekum v. Wabash &c. Railway*, 3 Am. St. Rep. 549, at p. 554.

HUSBAND AND WIFE — ANTENUPTIAL AGREEMENT — PRESUMPTION. — A promised B before marriage to relinquish all right to dower in B's estate, in consideration that she should have a preferred claim against the estate, if she survived B, payable within two years after his death. The contract was free from fraud except so far as fraud might be inferred from a provision for A much smaller than her dower interest. *Held*, where a provision in lieu of dower is disproportionate to the means of the intended husband, there is presumption of concealment of facts material to the contract, and the burden is upon him who claims in the husband's right to show that the wife had full knowledge of them. As it has not been shown that A knew the extent of B's property at the time of the agreement, dower should be assigned to her. *Taylor v. Taylor*, 33 N. E. Rep. 532 (Ill.).

HUSBAND AND WIFE — ANTENUPTIAL AGREEMENT — CONSIDERATION. — Before marriage with defendant, plaintiff went with him, at his request, to his attorney, who drew a contract, whereby, in consideration of \$5,000, plaintiff relinquished all claims to dower in defendant's estate. Plaintiff, on reading the draft, said she was not marrying for money. To the reply that defendant would not marry unless she gave up her right to dower, she said she was willing, but wanted no money. She then executed another contract with a nominal consideration, though she gave up a dower interest thereby of more than \$8,000. No evidence was given that the nature of the contract was explained to plaintiff. *Held*, upon a suit for cancellation of the contract, defendant has the burden of convincing the court by most cogent proof that plaintiff executed the agreement freely, and understood the effect of it. That burden this evidence does not sustain. *Graham v. Graham*, 22 N. Y. Supp. 299.

At common law antenuptial agreements were no bar to dower. *Vernon's Case*, 4 Coke, 1. Before the Statute of Uses, most of the land in England was held by feoffees to uses. As there was no dower in uses, a jointure was generally created before marriage, that the wife might have a competent provision after her husband's death; but when the Statute of Uses executed the legal title in the *cestuis que usent*, the wives who had jointures would have got both jointure and dower, had it not also provided that women having jointures should not take dower. While the effect of the statute has been to allow an antenuptial contract to bar dower, yet the historical idea that the contract is *for the benefit of the wife* still prevails.

The principal case, and *Taylor v. Taylor*, *supra*, make it almost impossible to bar dower, unless the provision for the wife is a fair equivalent for the dower, so strong a presumption of fraud is raised against the transaction. Most recent decisions state the same principle as these cases, though it is doubtful if any have gone as far upon the facts. *Kline's Estate*, 64 Pa. St. 122; *Pierce v. Pierce*, 71 N. Y. 154; *Spurlock v. Brown*, 18 S. W. Rep. 868 (Tenn.). But see *Forwood v. Forwood*, 86 Ky. 114.

HUSBAND AND WIFE—RIGHT OF WIDOW TO CONTROL HUSBAND'S INTERMENT.—*Held*, that a widow has a right to remove the body of her husband from its place of original sepulture without the consent of the next of kin of the deceased. *Hackett v. Hackett*, 26 Atl. Rep. 42 (R. I.).

This decision is undoubtedly correct. See Report of Mr. S. B. Ruggles on the Law of Burial, 4 Bradf. Sur. 503, and a note to the case of *Weld v. Walker*, in 14 Am. Law Rev. (N. S. vol. 1) 62.

INSURANCE—CONDITIONS IN POLICY.—An insurance policy provided that the insurer shall not be liable for loss caused by an "explosion of any kind, unless fire ensues, and then for the loss or damage by fire only." *Held*, that the insurance company is not liable when the damage resulted from an explosion produced by lighting a match in a room filled with illuminating gas; the explosion, and not the ignition of the match, being the proximate cause of the injury. *Heuer v. Northwestern Nat. Ins. Co.*, 33 N. E. Rep. 411 (Ill.).

This precise point has not often come before the courts, and the case is one of first impression in Illinois. The decision seems undoubtedly sound. Cf. 2 May on Insurance, § 416 a; also *Briggs v. Ins. Co.*, 53 N. Y. 446, *accord*.

MUNICIPAL CORPORATIONS—POWER TO GRANT EXCLUSIVE FRANCHISE.—By Act of Incorporation, a city had exclusive power "to permit, allow, and regulate the laying down of tracks for street-cars." *Held*, that the city did not thereby obtain authority to grant for a term of years the exclusive right to occupy its streets with street railroads. *Parkhurst v. City of Salem*, 32 Pac. Rep. 304 (Ore.).

The court bases its decision on the general ground that such extraordinary power can be conferred upon a city only by the use of express terms in the legislative grant, and can never be implied from a mere general authority. This is in accord with the great weight of authority, and the same principles are applied with respect to the grant of franchises for ferries, and for the laying of gas and water pipes. See 2 Dillon, Municipal Corporations, 727.

PATENTS—LAPSE OF FOREIGN PATENT BEFORE ISSUE OF AMERICAN PATENT.—Section 4887 of the Revised Statutes (U. S.) provides that "Every patent granted for an invention which has previously been patented in a foreign country shall be so limited as to expire with the foreign patent; or, if there be more than one, at the same time with the one having the shortest term." In 1874, P. & D. obtained for a certain invention an English patent running for fourteen years. In 1881, by reason of failure to pay a stamp duty this patent lapsed. In 1882, plaintiff, assignee of P. & D., obtained an American patent for the same invention. *Held*, that the American patent was void *ab initio*. *Huber et al. v. N. O. Nelson Manufacturing Co.*, 13 Sup. Ct. Rep. 602.

In *Pohl v. Brewing Co.*, 134 U. S. 385, the Supreme Court had held that where the foreign patent lapsed *after* the issue of the American patent, the latter continued to run for the term for which the foreign patent had been originally granted. The case at bar is distinguished upon the ground that the continued existence of the foreign patent is a condition precedent to the creation, though not to the running, of an American patent issued under § 4887.

PUBLIC OFFICER—ELECTION OF AN ALIEN—NATURALIZATION AFTER ELECTION.—A was elected sheriff of a county in Iowa; after the election it was discovered that he was an alien, although he had not known it before, supposing his father was naturalized before he came of age. He immediately applied for naturalization papers, and these were granted him before the time for entering into the office. *Held*, that he was qualified to hold the office, and the fact that he was not so qualified when elected was immaterial. *State v. Van Beck*, 54 N. W. Rep. 525 (Iowa).

The majority of the court place the case upon common-law principles, holding that no constitutional or statutory provisions are applicable, and expressly following *State v. Murry*, 28 Wis. 96, and *State v. Trumpf*, 50 Wis. 103; s. c. 5 N. W. Rep. 876, and 6 N. W. Rep. 512.

REAL PROPERTY—ABUTTER'S RIGHT TO DAMAGES FOR CHANGE IN GRADE OF STREET BY RAILROAD.—The highway on which plaintiff's land abutted crossed defendant's tracks. Defendant raised the grade of its tracks, and raised the highway correspondingly, thereby seriously interfering with plaintiff's access to his land. *Held*, that defendant is liable for damage thus caused. *Egbert v. Railway*, 32 N. E. Rep. 659 (Ind.).

This is the first carefully considered case on this point in Indiana, and the court expressly refuses to follow the New York doctrine laid down in *Conklin v. Railway*, 102 N. Y. 107. The authorities are collected in Lewis on Eminent Domain, § 118, notes 3 and 4.

REAL PROPERTY—CONVEYANCE OF COAL—RIGHT OF GRANTOR TO REACH UNDERLYING OIL.—The owner of land granted in fee coal lying under the surface, reserving to himself no right or easement in said coal. *Held* (1), that the grantor retained the title to everything beneath the coal down to the centre of the earth; and hence (2) that the grantee, though he owns the coal in fee, is not entitled to an injunction restraining the grantor from boring through the coal to reach gas and oil found to exist beneath it. *Chartier's Block Coal Co. v. Mellon*, 25 Atl. Rep. 597 (Penn.).

REAL PROPERTY—QUITCLAIM DEED—BONA FIDE PURCHASER.—*Held*, that the grantee of land is not precluded from setting up the defence of purchase for value without notice against prior equitable rights, by reason of the fact that he holds under a quitclaim deed which purported to convey only the grantor's right, title, and interest. *Moelle v. Sherwood*, 13 Sup. Ct. Rep. 426. Reaffirmed (*semble*) *United States v. California & Oregon Land Co.*, 13 Sup. Ct. Rep. 458.

The first case comes up from the United States Circuit Court for Nebraska; but Field, J., in his opinion, cites no Nebraska cases, and treats the subject as one of general law. This is a generalization from the case of *McDonald v. Belding*, 145 U. S. 492, where the same decision was reached in a case coming from Arkansas in harmony with decisions of the Supreme Court of that State. The *dicta* to the contrary in *Oliver v. Piatt*, 3 How. 333, at p. 410; *May v. Le Claire*, 11 Wall. 217, at p. 232; and *Baker v. Humphrey*, 101 U. S. 494, at p. 499, must be considered as overruled.

SALES—STATUTE OF FRAUDS.—Plaintiff sued defendant on an oral agreement to sell and assign a mortgage. *Held*, that this was a contract for the sale of "goods, wares, and merchandise" within the 17th section of the Statute of Frauds, and that the court below was in error in refusing to nonsuit, as its requirements had not been satisfied. *Greenwood v. Law*, 26 N. E. Rep. 134 (N. J.).

This is a case of first impression in New Jersey, following *Tisdale v. Harris*, 20 Pick. 9, where Shaw, C. J., in 1837, held that shares in a corporation were within the statute, citing for this position several English cases. In 1840 the Court of Queen's Bench in *Humble v. Mitchell*, 11 Ad. & E. 205, decided the other way. The opinion was a short one, and made no mention of the English authorities cited in the Massachusetts case, but it has been followed in England. See Benjamin, Sales, 4th ed., p. 111.

TORTS—ACTION BY PARENT FOR LOSS OF SERVICES.—A minor living with and supported by his widowed mother was injured by the negligence of defendant. *Held*, the mother can recover for loss of his services, and for expenses reasonably incurred in caring for the child. *Horgan v. Pacific Mills*, 33 N. E. Rep. 581 (Mass.).

This is in line with the general tendency to allow a recovery in such cases, 50 N. H. 501.

TORT—ARREST WITHOUT WARRANT.—One A took part in an affray. Defendant, who was town marshal, was informed a few minutes afterwards that a breach of the peace had been committed. On his arrival at the spot where the affray took place the parties were gone, and good order had been restored; but defendant pursued A and attempted to arrest him without a warrant. In the struggle which ensued, A was killed. *Held*, that defendant had no authority in law to arrest A without a warrant. *State v. Lewis*, 33 N. E. Rep. 405 (Ohio).

The decision is clearly right, the power to arrest without warrant being given to prevent a breach of the peace, but suggests a most difficult question of fact, *i. e.* when is an affray over? The better opinion seems to be that an affray is over as soon as the parties have ceased fighting, unless there is a reasonable apprehension of an immediate renewal of the breach of the peace. See *Timothy v. Simpson*, 1 Cramp. M. & R. 757; *Queen v. Marsden*, L. R. 1 Cr. Cas. 131.

TORTS—NEGLECTANCE—EXISTENCE OF DUTY NOT ARISING OUT OF CONTRACT.—Plaintiff was mortgagee of a builder's interest, and advanced money in instalments on the faith of certificates issued by defendant to the effect that certain stages in the work had been reached. Defendant's contract was with the owner of the land. In consequence of his negligence, the certificates contained untrue statements, and the plaintiff was damaged. *Held*, that defendant owed no duty to plaintiff, and therefore was not liable. *Le Euvre v. Gould*, [1893], 1 Q. B. 491.

This decision would be followed by the majority of courts. *Mechem on Agency*, § 836, and cases cited. If defendant did not know plaintiff would rely on his certificates, unquestionably the decision is correct. If he did know, then the case is within the general doctrine of *Derry & Peek*, 14 App. Cas. 337, though not so strong, for the representation here was not made directly to the person injured. The courts might well, however, transform the moral responsibility of using care into a legal duty, — a view which is put forward by Sir Frederick Pollock in 5 L. Q. R. 422.

TRUSTS — DEVISE FOR HOSPITALITY. — A will executed by an orthodox member of the Society of Friends directed his trustees to keep his house open "for the reception and entertainment of ministers and others travelling in the service of truth," in the same manner that he and his ancestors before him had dispensed their hospitality. *Held*, that the trust is not one for charitable or religious uses, but for hospitality alone, and hence is void, under the statute against perpetuities. *Kelly v. Nichols*, 25 Atl. Rep. 840 (R. I.).

This decision seems clearly correct. Gratuitous aid to those not in need of it is benevolence, not charity, in the legal acceptance of the word.

TRUSTS — MORTGAGE IN FRAUD OF CREDITORS — PARTIAL ASSIGNMENT TO PURCHASER FOR VALUE WITHOUT NOTICE. — A debtor gave his note, secured by a mortgage, to a volunteer to defraud his creditors. The volunteer assigned a part of the note and mortgage to G, a purchaser for value without notice. The creditors filed a petition for a sale of the mortgaged land and an adjustment of the claims upon it, and made G a party. *Held*, that G was entitled as against the creditors to the share which he had purchased. *Holmes v. Gardner*, 33 N. E. Rep. 644 (Ohio).

This decision is clearly right; but it is interesting, as being apparently the first decision on the point. That one who had purchased the whole mortgage debt, and had got the legal title by a conveyance of the mortgaged premises, should be protected is of course well settled. It is also certain that, had the mortgagee merely declared himself a trustee for the purchaser, the purchaser would not have been protected. The actual facts are not on all fours with either of these cases. The purchaser had got, not a legal, but an equitable interest; and though the interest was equitable, it was certainly not the agreement of the parties that the purchaser should have a claim against the mortgagee as trustee of the mortgage debt to the extent of the interest purchased. What the purchaser got was an interest in the debt itself; and to this he was entitled against the creditors as he would have been to a charge on the land.

TRUSTS — PURCHASE FOR VALUE — EXECUTION SALE. — Trust property was sold at execution sale to satisfy a judgment against the trustee. The judgment creditor bid in the property, in ignorance of the trust, and the amount of the purchase price was credited on his judgment. *Held*, that the judgment creditor was a purchaser for value, and so took the land free from equities. *Riley v. Martinelli*, 32 Pac. Rep. 579 (Cal.).

The authorities appear to be in conflict, but the case seems clearly correct, since for this purpose the creditor was in same position as any other purchaser, and in taking satisfaction of his judgment gave up a right to prosecute it further, thus parting with a present valuable consideration.

WILLS — CONSTRUCTION. — H bequeathed money in trust for P, who was to invest the same in bank stock, and to pay the income thereof to R, during her life, and at her death to pay and deliver the trust property to the lawful issue of R then alive. *Held*, that the property should be distributed among the children and grandchildren of R, since the word "issue" includes all descendants. *Pearce v. Rickard*, 26 Atl. Rep. 38 (R. I.).

It is submitted that the *per stirpes* construction of the word "issue," approved by Chancellor Kent (4 Kent. Comm. 278) and Judge Redfield ("Law of Wills," part ii, p. 363), is preferable to the broader construction favored by the Rhode Island court. To hold the term "issue" synonymous with "children" is to give effect to the probable intention of the testator, without doing violence to the language he has used to express that intention.

WILLS — REVOCATION IMPLIED BY DIVORCE. — A husband executed his will, giving his property to his wife, and gave the will into her possession for safe keeping. Some ten years afterwards she obtained a divorce; pending the suit, the parties by mutual agreement made a division of their property, he deeding her a part, and she reclaiming all interest in the remainder. About two years after the divorce the husband died. The divorced wife then brought forward the will, which she had kept in her possession, and presented it for probate. *Held*, that the divorce revoked the will by implication of law. *Lansing v. Haynes*, 54 N. W. Rep. 699 (Mich.).

The case seems to be an extension of the doctrine of revocation implied from change of circumstances, which heretofore has been largely confined to the marriage of a *feme sole* and the marriage of a man and birth of issue. The court found only one case which had much bearing upon the question, and that, so far as it is in point, is *contra*. *Charlton v. Miller*, 27 Ohio St. 298. It cannot be said that this extension is an unreasonable one; but it is submitted that the same result might have been accomplished by allowing the divorced wife to take under the will, but compelling her to hold as a constructive trustee for the heirs-at-law, as it would not have been honest for her to keep the property for herself.

REVIEWS.

A TREATISE ON THE LAW OF TAX TITLES. By Henry Campbell Black, M.A. Second Edition, Revised and Enlarged. pp. lxix, 716. St. Paul, Minn.: West Publishing Co. 1893.

In this edition several new topics and some two thousand cases have been added; furthermore, the text has been rewritten. This not only brings the work down to date, but makes it more valuable to the profession than the first edition (1888) was. In arrangement the book retains the form of a series of sections categorically expressed, and conveniently arranged and indexed. Of course, in a question where statutes play so important a part, any book on the question must be read with the statutes close at hand. This is necessary with the book under review, since the author, where he can, states the general rule and common law of tax titles.

There is but one other treatise exclusively devoted to this subject, — Blackwell's Tax Titles, now in its fifth edition (1889).

The publishers have given good paper and type, and lead us to hope for better things from them in this line. J. C.

CODE PRACTICE IN PERSONAL ACTIONS. An Elementary Treatise upon the Practice in a Civil Action, as Governed by the Provisions of the New York Code of Civil Procedure. Prepared for the Use of Students. By James L. Bishop. pp. xxiii., 567. New York: Baker, Voorhis, & Company. 1893.

This is not to be confused with the work of Mr. J. P. Bishop, best known by his book on Contracts. Mr. James L. Bishop, our author, is also the author of "A Treatise on Insolvent Debtors," and editor of the third edition (revised) of "Burrill on Assignments."

The title fairly defines the book and its object, — a first book on practice under the New York code. It is the outcome of a course of lectures delivered at Columbia Law School, and is in effect a commentary and exposition of the code thrown into clear, readable shape, and unencumbered with many authorities. Unlike the usual aids, of one sort or another, which we have of our codes, it is not devoted alone to pleading and forms, but treats of jurisdiction, evidence, law of persons, rules of court, and the other topics of personal practice.

Written for the special class of the beginners, it ought to succeed, because it is clear and concise. And because the late cases are cited and the author's work careful, it will be useful to men in practice. It is the best work yet published on this subject. J. C.

ABBOTT'S NEW YORK DIGEST. ANNUAL, 1892; January, 1892–January, 1893. Edited by Austin Abbott. pp. xxxix, 540. New York: Diossy Law Book Company. 1893.

This digest appears in its usual form. Its substance is increased by giving with each case the citation of most of the reports and reporters in which it may be found. The editor's statement in his "Notice to the Reader" that *all* the reports and reporters in which a case may be found

have been given, is not quite accurate, for there are no references to the reports in the North-Eastern Reporter of the cases in the Court of Appeals. Besides being a handy key to the statutes passed and the points decided in New York during the period covered by each number, this digest — owing to its notes, collecting references to reports of other States, to text books and periodicals — is a help to any one who is looking up the general law on a point. And the editor announces that in this number he has taken greater pains than ever with these notes. H. H. B.

NEGLIGENCE OF IMPOSED DUTIES, CARRIERS OF PASSENGERS. By Charles A. Ray, LL.D., ex-Justice of Supreme Court of Indiana. Rochester, N.Y. The Lawyers' Co-operative Publishing Company. 1893. 8vo. pp. lxxviii and 820.

This is the second volume of a series, the first of which was noticed in the REVIEW for December, 1891. It has both the faults and the virtues of its predecessor. It suffers as that did from its involved style and lack of clear and methodical statement of leading principles. A student who tried to gain from it a knowledge of the topic would be both wearied and confused. On the other hand, a practising lawyer who is already more or less familiar with first principles, and wants primarily a reference book, will find the work of value. The field covered is one in which cases constantly arise, and in which the multitude of authorities creates a crying need for their collection and classification in accessible form. Between two and three thousand decisions are here referred to, and a good general arrangement and careful index render it easy to ascertain the drift of opinion on any desired question. The points of all the more important decisions are given with accuracy and judgment; and this wealth of citations, while for the student it cumbers the text, would be of material assistance in a search for authorities. In short, it is as a compendium from the digests that the book will find its place. A. D. H.

DER NICARAGUA KANAL. By Lindley M. Keasbey, Doctor der Staatswissenschaften. Strassburg: Karl J. Trübner. 1893. pp. 109.

This pamphlet is based upon an essay published by Mr. Keasbey at the time of receiving the Doctor's degree from Columbia College (1890), and entitled "The Early Diplomatic History of the Nicaragua Canal." In his subsequent studies in Strasburg this theme was enlarged upon, and published in its present form in the German language by the University of Strasburg. The pamphlet forms an excellent historical sketch, beginning with the early years of the sixteenth century, of the various projects for uniting the Atlantic and Pacific oceans by means of a canal. It shows thorough research, and will be valued as well for the facts presented as for the very full list of references given.

Mr. Keasbey is a graduate of Harvard in the class of 1888, and is now Professor of "Biblical and Social Science" in the University of Colorado. F. S.

THE LAW OF COLLATERAL ATTACK ON JUDICIAL PROCEEDINGS. By John M. Vanfleet, Judge of the Thirty-fourth Judicial Circuit of Indiana. Chicago: Callaghan & Co. 1892. pp. xciv and 1016.

This book is the first attempt to collect, compare, and reduce to order the enormous number of cases which involve more or less directly questions of collateral attack on judicial proceedings. It represents an immense amount of labor; Judge Vanfleet tells us that he has worked at his subject six hours a day for seven years, taking no vacations. A glance at his book certainly bears out this assertion. Principles are first discussed; then myriads of cases are cited and abstracted, under appropriate titles, arranged, as far as possible, in alphabetical order. As the first work in a new and stony field, this book can hardly fail to be of great value.

E. B. A.

DEATH BY WRONGFUL ACT. By Francis B. Tiffany. St. Paul, Minn.: West Publishing Co. 1893. pp. xlv, 396.

"The purpose of this book," says Mr. Tiffany, "is to treat of those questions of law which are peculiar to the various civil actions maintainable where the death of a person has been caused by the wrongful act or negligence of another." In view of the statutes which have everywhere followed Lord Campbell's Act, giving a remedy for death caused by negligence, such a book should arouse interest. Most readers will learn with surprise (page 5) that in 1648, nearly two hundred years before this Act, there was a statute in Massachusetts whereby a town must pay an hundred pounds to the representatives of a person killed by any defect in ways or bridges, if previous notice had been given to a selectman of the town. The opening chapter of the volume, the author (who graduated from Harvard Law School in 1880) devotes to remedies at common law in cases of death by wrongful act. He then passes to his main work,—a discussion of the construction of the statutes, principally under the heads, "The Wrongful Act," "The Beneficiaries," "Parties," "Statutes of Limitation," "Matters of Defence," and "Damages." An appendix contains the statutes themselves; and there is an analytic table, where the leading provisions of the different enactments are condensed in convenient form for comparison and reference. The book, carefully prepared, and upon a subject never separately treated before, should be valuable to the profession.

A. N. H.

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NO. 3.

THE ORIGIN AND SCOPE OF THE AMERICAN DOCTRINE OF CONSTITUTIONAL LAW.¹

I. **H**OW did our American doctrine, which allows to the judiciary the power to declare legislative Acts unconstitutional, and to treat them as null, come about, and what is the true scope of it?

It is a singular fact that the State constitutions did not give this power to the judges in express terms; it was inferential. In the earliest of these instruments no language was used from which it was clearly to be made out. Only after the date of the Federal constitution was any such language to be found; as in Article XII. of the Kentucky constitution of 1792. The existence of the power was at first denied or doubted in some quarters; and so late as the year 1825, in a strong dissenting opinion, Mr. Justice Gibson, of Pennsylvania, one of the ablest of American judges, and afterwards the chief justice of that State, wholly denied it under any constitution which did not expressly give it. He denied it, therefore, under the State constitutions generally, while admitting that in that of the United States the power was given; namely, in the second clause of Article VI., when providing that the constitution,

¹ Read at Chicago, August 9, 1893, before the Congress on Jurisprudence and Law Reform.

and the laws and treaties made in pursuance thereof, "shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the constitution or laws of any State to the contrary notwithstanding."¹

So far as the grounds for this remarkable power are found in the mere fact of a constitution being in writing, or in judges being sworn to support it, they are quite inadequate. Neither the written form nor the oath of the judges necessarily involves the right of reversing, displacing, or disregarding any action of the legislature or the executive which these departments are constitutionally authorized to take, or the determination of those departments that they are so authorized. It is enough, in confirmation of this, to refer to the fact that other countries, as France, Germany, and Switzerland, have written constitutions, and that such a power is not recognized there. "The restrictions," says Dicey, in his admirable *Law of the Constitution*, "placed on the action of the legislature under the French constitution are not in reality laws, since they are not rules which in the last resort will be enforced by the courts. Their true character is that of maxims of political morality, which derive whatever strength they possess from being formally inscribed in the constitution, and from the resulting support of public opinion."²

How came we then to adopt this remarkable practice? Mainly as a natural result of our political experience before the War of Independence, — as being colonists, governed under written charters of government proceeding from the English Crown. The terms and limitations of these charters, so many written constitutions, were enforced by various means, — by forfeiture of the char-

¹ This opinion has fallen strangely out of sight. It has much the ablest discussion of the question which I have ever seen, not excepting the judgment of Marshall in *Marbury v. Madison*, which, as I venture to think, has been overpraised. Gibson afterwards accepted the generally received doctrine. "I have changed that opinion," said the Chief Justice to counsel, in *Norris v. Clymer*, 2 Pa. St., p. 281 (1845), "for two reasons. The late convention [apparently the one preceding the Pennsylvania constitution of 1838] by their silence sanctioned the pretensions of the courts to deal freely with the Acts of the legislature; and from experience of the necessity of the case."

² Ch. ii. p. 127, 3d ed. President Rogers, in the preface to a valuable collection of papers on the "Constitutional History of the United States, as seen in the Development of American Law," p. 11, remarks that "there is not in Europe to this day a court with authority to pass on the constitutionality of national laws. But in Germany and Switzerland, while the Federal courts cannot annul a Federal law, they may, in either country, declare a cantonal or State law invalid when it conflicts with the Federal law." Compare Dicey, *ubi supra*, and Bryce, *Am. Com.*, i. 430, note (1st ed.), as to possible qualifications of this statement.

ters, by Act of Parliament, by the direct annulling of legislation by the Crown, by judicial proceedings and an ultimate appeal to the Privy Council. Our practice was a natural result of this; but it was by no means a necessary one. All this colonial restraint was only the usual and normal exercise of power. An external authority had imposed the terms of the charters, the authority of a paramount government, fully organized and equipped for every exigency of disobedience, with a king and legislature and courts of its own. The superior right and authority of this government were fundamental here, and fully recognized; and it was only a usual, orderly, necessary procedure when our own courts enforced the same rights that were enforced here by the appellate courts in England. These charters were in the strict sense written *law*: as their restraints upon the colonial legislatures were enforced by the English courts of last resort, so might they be enforced through the colonial courts, by disregarding as null what went counter to them.¹

The Revolution came, and what happened then? Simply this: we cut the cord that tied us to Great Britain, and there was no longer an external sovereign. Our conception now was that "the people" took his place; that is to say, our own home population in the several States were now their own sovereign. So far as existing institutions were left untouched, they were construed by translating the name and style of the English sovereign into that of our new ruler, — ourselves, the People. After this the charters, and still more obviously the new constitutions, were not so many orders from without, backed by an organized outside government, which simply performed an ordinary function in enforcing them; they were precepts from the people themselves who were to be governed, addressed to each of their own number, and especially to those who were charged with the duty of conducting the government. No higher power existed to support these orders by compulsion of the ordinary sort. The sovereign himself, having written these expressions of his will, had retired into the clouds; in any regular course of events he had no organ to enforce his will, except

¹ For the famous cases of *Lechmere v. Winthrop* (1727-28), *Phillips v. Savage* (1734), and *Clark v. Tousey* (1745), see the Talcott Papers, Conn. Hist. Soc. Coll., iv. 94, note. For the reference to this volume I am indebted to the Hon. Mellen Chamberlain, of Boston. The decree of the Privy Council, in *Lechmere v. Winthrop*, declaring "null and void" a provincial Act of nearly thirty years' standing, is found in Mass. Hist. Soc. Coll., sixth series, v. 496.

those to whom his orders were addressed in these documents. How then should his written constitution be enforced if these agencies did not obey him, if they failed, or worked amiss?

Here was really a different problem from that which had been presented under the old state of things. And yet it happened that no new provisions were made to meet it. The old methods and the old conceptions were followed. In Connecticut, in 1776, by a mere legislative Act, the charter of 1662 was declared to continue "the civil Constitution of the State, under the sole authority of the People thereof, independent of any King or Prince whatsoever;" and then two or three familiar fundamental rules of liberty and good government were added as a part of it. Under this the people of Connecticut lived till 1818. In Rhode Island the charter, unaltered, served their turn until 1842; and, as is well known, it was upon this that one of the early cases of judicial action arose for enforcing constitutional provisions under the new order of things, as against a legislative Act; namely, the case of *Trevett v. Weeden*, in the Rhode Island Supreme Court in 1786.¹

But it is instructive to see that this new application of judicial power was not universally assented to. It was denied by several members of the Federal convention, and was referred to as unsettled by various judges in the last two decades of the last century. The surprise of the Rhode Island legislature at the action of the court in *Trevett v. Weeden* seems to indicate an impression in their minds that the change from colonial dependence to independence had made the legislature the substitute for Parliament, with a like omnipotence.² In Vermont it seems to have been the established doctrine of the period that the judiciary could not disregard a legislative Act; and the same view was held in Connec-

¹ Varnum's Report of the case (Providence, 1787); s. c. 2 Chandler's Crim. Trials, 269.

² And so of the excitement aroused by the alleged setting aside of a legislative Act in New York in 1784, in the case of *Rutgers v. Waddington*. Dawson's edition of this case, "With an Historical Introduction" (Morrisania, 1866), pp. xxiv *et seq.* In an "Address to the People of the State," issued by the committee of a public meeting of "the violent Whigs," it was declared (pp. xxxiii) "That there should be a power vested in Courts of Judicature, whereby they might control the Supreme Legislative power, we think is absurd in itself. Such powers in courts would be destructive of liberty, and remove all security of property." For the reference to this case, and a number of others, I am indebted to a learned article on "The Relation of the Judiciary to the Constitution" (19 Am. Law Rev. 175) by William M. Meigs, Esq., of the Philadelphia bar. It gives all the earliest cases. As Mr. Meigs remarks, the New York case does not appear to be really one of holding a law *unconstitutional*.

ticut, as expressed in 1795 by Swift, afterwards chief justice of that State. In the preface to 1 D. Chipman's (Vermont) Reports, 22 *et seq.*, the learned reporter, writing (in 1824) of the period of the Vermont Constitution of 1777, says that "No idea was entertained that the judiciary had any power to inquire into the constitutionality of Acts of the legislature, or to pronounce them void for any cause, or even to question their validity." And at page 25, speaking of the year 1785, he adds: "Long after the period to which we have alluded, the doctrine that the constitution is the supreme law of the land, and that the judiciary have authority to set aside . . . Acts repugnant thereto, was considered anti-republican." In 1814,¹ for the first time, I believe, we find this court announcing an Act of the State legislature to be "void as against the constitution of the State and the United States, and even the laws of nature." It may be remarked here that the doctrine of declaring legislative Acts void as being contrary to the constitution, was probably helped into existence by a theory which found some favor among our ancestors at the time of the Revolution, that courts might disregard such acts if they were contrary to the fundamental maxims of morality, or, as it was phrased, to the laws of nature. Such a doctrine was thought to have been asserted by English writers, and even by judges at times, but was never acted on. It has been repeated here, as matter of speculation, by our earlier judges, and occasionally by later ones; but in no case within my knowledge has it ever been enforced where it was the single and necessary ground of the decision, nor can it be, unless as a revolutionary measure.²

In Swift's "System of the Laws of Connecticut," published in 1795,³ the author argues strongly and elaborately against the power of the judiciary to disregard a legislative enactment, while men-

¹ Dupuy v. Wickwire, 1 D. Chipman, 237.

² This subject is well considered in a learned note to Paxton's Case (1761), Quincy's Rep. 51, relating to Writs of Assistance, understood to have been prepared by Horace Gray, Esq., now Mr. Justice Gray, of the Supreme Court of the United States. See the note at pp. 520-530. James Otis had urged in his argument that "an Act of Parliament against the Constitution is void" (Quincy, 56, n., 474). The American cases sometimes referred to as deciding that a legislative Act was void, as being contrary to the first principles of morals or of government,—*e. g.*, in Quincy, 529, citing Bowman v. Middleton, 1 Bay, 252, and in 1 Bryce, Am. Com., 431, n., 1st ed., citing Gardner v. Newburgh, Johns. Ch. Rep. 162,—will be found, on a careful examination, to require no such explanation.

³ Vol. i. pp. 50 *et seq.*

tioning that the contrary opinion "is very popular and prevalent." "It will be agreed," he says, "it is as probable that the judiciary will declare laws unconstitutional which are not so, as it is that the legislature will exceed their constitutional authority." But he makes the very noticeable admission that there may be cases so monstrous, — *e. g.*, an Act authorizing conviction for crime without evidence, or securing to the legislature their own seats for life, — "so manifestly unconstitutional, that it would seem wrong to require the judges to regard it in their decisions." As late as 1807 and 1808, judges were impeached by the legislature of Ohio for holding Acts of that body to be void.¹

II. When at last this power of the judiciary was everywhere established, and added to the other bulwarks of our written constitutions, how was the power to be conceived of? Strictly as a judicial one. The State constitutions had been scrupulous to part off the powers of government into three; and in giving one of them to each department, had sometimes, with curious explicitness, forbidden it to exercise either of the others. The legislative department, said the Massachusetts constitution in 1780,² —

"Shall never exercise the executive and judicial powers, or either of them; the executive shall never exercise the legislative and judicial powers or either of them; the judicial shall never exercise the legislative and executive powers or either of them; to the end, it may be a government of laws, and not of men."

With like emphasis, in 1792, the constitution of Kentucky³ said: —

"Each of them to be confided to a separate body of magistracy; to wit, those which are legislative to one, those which are executive to another, and those which are judiciary to another. No person or collection of persons, being of one of these departments, shall exercise any power properly belonging to either of the others, except in the instances hereinafter expressly permitted."

Therefore, since the power now in question was a purely judicial one, in the first place, there were many cases where it had no operation. In the case of purely political acts and of the exercise

¹ Cooley, *Const. Lim.*, 6th ed., 193, n.; 1 Chase's *Statutes of Ohio*, preface, 38-40. For the last reference I am indebted to my colleague, Professor Wambaugh.

² Part I. Art. 30.

³ Art. I.

of mere discretion, it mattered not that other departments were violating the constitution, the judiciary could not interfere; on the contrary, they must accept and enforce their acts. Judge Cooley has lately said:¹—

“The common impression undoubtedly is that in the case of any legislation where the bounds of constitutional authority are disregarded, . . . the judiciary is perfectly competent to afford the adequate remedy; that the Act indeed must be void, and that any citizen, as well as the judiciary itself, may treat it as void, and refuse obedience. This, however, is far from being the fact.”

Again, where the power of the judiciary did have place, its whole scope was this; namely, to determine, for the mere purpose of deciding a litigated question properly submitted to the court, whether a particular disputed exercise of power was forbidden by the constitution. In doing this the court was so to discharge its office as not to deprive another department of any of its proper power, or to limit it in the proper range of its discretion. Not merely, then, do these questions, when presenting themselves in the courts for judicial action, call for a peculiarly large method in the treatment of them, but especially they require an allowance to be made by the judges for the vast and not definable range of legislative power and choice, for that wide margin of considerations which address themselves only to the practical judgment of a legislative body. Within that margin, as among all these legislative considerations, the constitutional law-makers must be allowed a free foot. In so far as legislative choice, ranging here unfettered, may select one form of action or another, the judges must not interfere, since *their* question is a naked judicial one.

Moreover, such is the nature of this particular judicial question that the preliminary determination by the legislature is a fact of very great importance, since the constitutions expressly intrust to the legislature this determination; they cannot act without making it. Furthermore, the constitutions not merely intrust to the legislatures a preliminary determination of the question, but they contemplate that this determination may be the final one; for they secure no revision of it. It is only as litigation may spring up, and as the course of it may happen to raise the point of constitutionality, that any question for the courts can regularly emerge. It may be, then, that the mere legislative decision will accomplish

¹ Journal of the Michigan Pol. Sc. Association, vol. i. p. 47.

results throughout the country of the profoundest importance before any judicial question can arise or be decided,—as in the case of the first and second charters of the United States Bank, and of the legal tender laws of thirty years ago and later. The constitutionality of a bank charter divided the cabinet of Washington, as it divided political parties for more than a generation. Yet when the first charter was given, in 1791, to last for twenty years, it ran through its whole life unchallenged in the courts, and was renewed in 1816. Only after three years from that did the question of its constitutionality come to decision in the Supreme Court of the United States. It is peculiarly important to observe that such a result is not an exceptional or unforeseen one; it is a result anticipated and clearly foreseen. Now, it is the legislature to whom this power is given,—this power, not merely of enacting laws, but of putting an interpretation on the constitution which shall deeply affect the whole country, enter into, vitally change, even revolutionize the most serious affairs, except as some individual may find it for his private interest to carry the matter into court. So of the legal tender legislation of 1863 and later. More important action, more intimately and more seriously touching the interests of every member of our population, it would be hard to think of. The constitutionality of it, although now upheld, was at first denied by the Supreme Court of the United States. The local courts were divided on it, and professional opinion has always been divided. Yet it was the legislature that determined this question, not merely primarily, but once for all, except as some individual, among the innumerable chances of his private affairs, found it for his interest to raise a judicial question about it.

It is plain that where a power so momentous as this primary authority to interpret is given, the actual determinations of the body to whom it is intrusted are entitled to a corresponding respect; and this not on mere grounds of courtesy or conventional respect, but on very solid and significant grounds of policy and law. The judiciary may well reflect that if they had been regarded by the people as the chief protection against legislative violation of the constitution, they would not have been allowed merely this incidental and postponed control. They would have been let in, as it was sometimes endeavored in the conventions to let them in, to a revision of the laws before they began to operate.¹ As the oppor-

¹ The constitution of Colombia, of 1886, art. 84, provides that the judges of the Supreme Court may take part in the legislative debates over "bills relating to civil

tunity of the judges to check and correct unconstitutional Acts is so limited, it may help us to understand why the extent of their control, when they do have the opportunity, should also be narrow.

It was, then, all along true, and it was foreseen, that much which is harmful and unconstitutional may take effect without any capacity in the courts to prevent it, since their whole power is a judicial

matters and judicial procedure." And in the case of legislative bills which are objected to by "the government" as unconstitutional, if the legislature insist on the bill, as against a veto by the government, it shall be submitted to the Supreme Court, which is to decide upon this question finally. Arts. 90 and 150. See a translation of this constitution by Professor Moses, of the University of California, in the supplement to the *Annals of the American Academy of Political and Social Science*, for January, 1893.

We are much too apt to think of the judicial power of revising the acts of the other departments as our only protection against oppression and ruin. But it is remarkable how small a part this played in any of the debates. The chief protections were a wide suffrage, short terms of office, a double legislative chamber, and the so-called executive veto. There was, in general, the greatest unwillingness to give the judiciary any share in the law-making power. In New York, however, the constitution of 1777 provided a Council of Revision, of which several of the judges were members, to whom all legislative Acts should be submitted before they took effect, and by whom they must be approved. That existed for more than forty years, giving way in the constitution of 1821 to the common expedient of merely requiring the approval of the executive, or in the alternative, if he refused it, the repassing of the Act, perhaps by an increased vote, by both branches of the legislature. In Pennsylvania (Const. of 1776, § 47) and Vermont (Const. of 1777, § 44) a Council of Censors was provided for, to be chosen every seven years, who were to investigate the conduct of affairs, and point out, among other things, all violations of the constitution by any of the departments. In Pennsylvania this arrangement lasted only from 1776 to 1790; in Vermont from 1777 to 1870. In framing the constitution of the United States, several of these expedients, and others, were urged, and at times adopted; *e.g.*, that of New York. It was proposed at various times that the general government should have a negative on all the legislation of the States; that the governors of the States should be appointed by the United States, and should have a negative on State legislation; that a Privy Council to the President should be appointed, composed in part of the judges; and that the President and the two houses of Congress might obtain opinions from the Supreme Court. But at last the convention, rejecting all these, settled down upon the common expedients of two legislative houses, to be a check upon each other, and of an executive revision and veto, qualified by the legislative power of reconsideration and enactment by a majority of two-thirds;—upon these expedients, and upon the declaration that the constitution, and constitutional laws and treaties, shall be the supreme law of the land, and shall bind the judges of the several States. This provision, as the phrasing of it indicates, was inserted with an eye to secure the authority of the general government as against the States, *i.e.* as an essential feature of any efficient Federal system, and not with direct reference to the other departments of the government of the United States itself. The first form of it was that "legislative Acts of the United States, and treaties, are the supreme law of the respective States, and bind the judges there as against their own laws."

one. Their interference was but one of many safeguards, and its scope was narrow.

The rigor of this limitation upon judicial action is sometimes freely recognized, yet in a perverted way which really operates to extend the judicial function beyond its just bounds. The court's duty, we are told, is the mere and simple office of construing two writings and comparing one with another, as two contracts or two statutes are construed and compared when they are said to conflict; of declaring the true meaning of each, and, if they are opposed to each other, of carrying into effect the constitution as being of superior obligation,—an ordinary and humble judicial duty, as the courts sometimes describe it. This way of putting it easily results in the wrong kind of disregard of legislative considerations; not merely in refusing to let them directly operate as grounds of judgment, but in refusing to consider them at all. Instead of taking them into account and allowing for them as furnishing possible grounds of legislative action, there takes place a pedantic and academic treatment of the texts of the constitution and the laws. And so we miss that combination of a lawyer's rigor with a statesman's breadth of view which should be found in dealing with this class of questions in constitutional law. Of this petty method we have many specimens; they are found only too easily to-day in the volumes of our current reports.

In order, however, to avoid falling into these narrow and literal methods, in order to prevent the courts from forgetting, as Marshall said, that "it is a constitution we are expounding," these literal precepts about the nature of the judicial task have been accompanied by a rule of administration which has tended, in competent hands, to give matters a very different complexion.

III. Let us observe the course which the courts, in point of fact, have taken, in administering this interesting jurisdiction.

They began by resting it upon the very-simple ground that the legislature had only a delegated and limited authority under the constitutions; that these restraints, in order to be operative, must be regarded as so much law; and, as being law, that they must be interpreted and applied by the court. This was put as a mere matter of course. The reasoning was simple and narrow. Such was Hamilton's method in the *Federalist*, in 1788,¹ while discussing the Federal constitution, but on grounds applicable, as he con-

¹ No. 78, first published on May 28, 1788. See Lodge's edition, pp. xxxvi and xliv.

ceived, to all others. So, in 1787, the Supreme Court of North Carolina had argued that no Act of the legislature could alter the constitution;¹ that the judges were as much bound by the constitution as by any other law, and any Act inconsistent with it must be regarded by them as abrogated. Wilson, in his Lectures at Philadelphia in 1790-1791,² said that the constitution was a supreme law, and it was for the judges to declare and apply it; what was subordinate must give way; because one branch of the government infringed the constitution, it was no reason why another should abet it. In Virginia, in 1793, the judges put it that courts were simply to look at all the law, including the constitution: they were only to expound the law, and to give effect to that part of it which is fundamental.³ Patterson, one of the justices of the Supreme Court of the United States, in 1795, on the Pennsylvania circuit,⁴ said that the constitution is the commission of the legislature; if their Acts are not conformable to it, they are without authority. In 1796, in South Carolina,⁵ the matter was argued by the court as a bald and mere question of conformity to paramount law. And such, in 1802, was the reasoning of the General Court of Maryland.⁶ Finally, in 1803 came *Marbury v. Madison*,⁷ with the same severe line of argument. The people, it was said, have established written limitations upon the legislature; these control all repugnant legislative Acts; such Acts are not law; this theory is essentially attached to a written constitution; it is for the judiciary to say what the law is, and if two rules conflict, to say which governs; the judiciary are to declare a legislative Act void which conflicts with the constitution, or else that instrument is reduced to nothing. And then, it was added, in the Federal instrument this power is expressly given.

Nothing could be more rigorous than all this. As the matter was put, the conclusions were necessary. Much of this reasoning, however, took no notice of the remarkable peculiarities of the situation; it went forward as smoothly as if the constitution were a private letter of attorney, and the court's duty under it were precisely like any of its most ordinary operations.

But these simple precepts were supplemented by a very signifi-

¹ *Den d. Bayard v. Singleton*, 1 Martin, 42.

² *Kemper v. Hawkins*, Va. Cas. 20.

³ *Vanhorne's Lessee v. Dorrance*, 2 Dall. 304.

⁴ *Lindsay v. Com'rs*, 2 Bay, 38.

⁵ *Whittington v. Polk*, 1 H. & J. 236.

² Vol i. p. 460.

⁷ 1 Cranch, 137.

cant rule of administration, — one which corrected their operation, and brought into play large considerations not adverted to in the reasoning so far mentioned. In 1811,¹ Chief Justice Tilghman, of Pennsylvania, while asserting the power of the court to hold laws unconstitutional, but declining to exercise it in a particular case, stated this rule as follows: —

“For weighty reasons, it has been assumed as a principle in constitutional construction by the Supreme Court of the United States, by this court, and every other court of reputation in the United States, that an Act of the legislature is not to be declared void unless the violation of the constitution is so manifest as to leave no room for reasonable doubt.”

When did this rule of administration begin? Very early. We observe that it is referred to as thoroughly established in 1811. In the earliest judicial consideration of the power of the judiciary over this subject, of which any report is preserved, — an *obiter* discussion in Virginia in 1782,² — while the general power of the court is declared by other judges with histrionic emphasis, Pendleton, the president of the court, in declining to pass upon it, foreshadowed the reasons of this rule, in remarking, —

“How far this court, in whom the judiciary powers may in some sort be said to be concentrated, shall have power to declare the nullity of a law passed in its forms by the legislative power, without exercising the power of that branch, contrary to the plain terms of that constitution, is indeed a deep, important, and, I will add, a tremendous question, the decision of which would involve consequences to which gentlemen may not . . . have extended their ideas.”

There is no occasion, he added, to consider it here. In 1793, when the General Court of Virginia held a law unconstitutional, Tyler, Justice, remarked,³ —

“But the violation must be plain and clear, or there might be danger of the judiciary preventing the operation of laws which might produce much public good.”

In the Federal convention of 1787, while the power of declaring laws unconstitutional was recognized, the limits of the power were also admitted. In trying to make the judges revise all legislative acts before they took effect, Wilson pointed out that laws might be

¹ *Com. v. Smith*, 4 Bin. 117.

² *Com. v. Call*, 4 Call, 5.

³ *Kemper v. Hawkins*, Va. Cases, p. 60.

dangerous and destructive, and yet not so "unconstitutional as to justify the judges in refusing to give them effect."¹ In 1796 Mr. Justice Chase, in the Supreme Court of the United States,² said, that without then determining whether the court could declare an Act of Congress void, "I am free to declare that I will never exercise it but in a very clear case." And in 1800, in the same court,³ as regards a statute of Georgia, Mr. Justice Patterson, who had already, in 1795, on the circuit, held a legislative Act of Pennsylvania invalid, said that in order to justify the court in declaring any law void, there must be "a clear and unequivocal breach of the Constitution, not a doubtful and argumentative implication."

In 1808 in Georgia⁴ it was strongly put, in a passage which has been cited by other courts with approval. In holding an Act constitutional, Mr. Justice Charlton, for the court, asserted this power, as being inseparable from the organization of the judicial department. But, he continued, in what manner should it be exercised?

"No nice doubts, no critical exposition of words, no abstract rules of interpretation, suitable in a contest between individuals, ought to be resorted to in deciding on the constitutional operation of a statute. This violation of a constitutional right ought to be as obvious to the comprehension of every one as an axiomatic truth, as that the parts are equal to the whole. I shall endeavor to illustrate this: the first section of the second article of the constitution declares that the executive function shall be vested in the governor. Now, if the legislature were to vest the executive power in a standing committee of the House of Representatives, every mind would at once perceive the unconstitutionality of the statute. The judiciary would be authorized without hesitation to declare the Act unconstitutional. But when it remains doubtful whether the legislature have or have not trespassed on the constitution, a conflict ought to be avoided, because there is a possibility in such a case of the constitution being with the legislature."

In South Carolina, in 1812,⁵ Chancellor Waties, always distinguished for his clear assertion of the power in the judiciary to disregard unconstitutional enactments, repeats and strongly reaffirms it:—

"I feel so strong a sense of this duty that if a violation of the constitution were manifest, I should not only declare the Act void, but I should

¹ 5 Ell. Deb. 344.

⁴ *Grimball v. Ross*, Charlton, 175.

² *Ware v. Hylton*, 3 Dall. 171.

⁵ *Adm'rs of Byrne v. Adm'rs of Stewart*, 3 Des. 466.

³ *Cooper v. Telfair*, 4 Dall. 14.

think I rendered a more important service to my country than in discharging the ordinary duties of my office for many years. . . . But while I assert this power and insist on its great value to the country, I am not insensible of the high deference due to legislative authority. It is supreme in all cases where it is not restrained by the constitution; and as it is the duty of legislators as well as judges to consult this and conform their acts to it, so it should be presumed that all their acts do conform to it unless the contrary is manifest. This confidence is necessary to insure due obedience to its authority. If this be frequently questioned, it must tend to diminish the reverence for the laws which is essential to the public safety and happiness. I am not, therefore, disposed to examine with scrupulous exactness the validity of a law. It would be unwise on another account. The interference of the judiciary with legislative Acts, if frequent or on dubious grounds, might occasion so great a jealousy of this power and so general a prejudice against it as to lead to measures ending in the total overthrow of the independence of the judges, and so of the best preservative of the constitution. The validity of the law ought not then to be questioned unless it is so obviously repugnant to the constitution that when pointed out by the judges, all men of sense and reflection in the community may perceive the repugnancy. By such a cautious exercise of this judicial check, no jealousy of it will be excited, the public confidence in it will be promoted, and its salutary effects be justly and fully appreciated."¹

¹ This well-known rule is laid down by Cooley (Const. Lim., 6th ed., 216), and supported by emphatic judicial declarations and by a long list of citations from all parts of the country. In *Ogden v. Saunders*, 12 Wheat. 213 (1827), Mr. Justice Washington, after remarking that the question was a doubtful one, said: "If I could rest my opinion in favor of the constitutionality of the law . . . on no other ground than this doubt, so felt and acknowledged, that alone would, in my estimation, be a satisfactory vindication of it. It is but a decent respect due to the . . . legislative body by which any law is passed, to presume in favor of its validity, until its violation of the constitution is proved beyond all reasonable doubt. This has always been the language of this court when that subject has called for its decision; and I know it expresses the honest sentiments of each and every member of this bench." In the *Sinking Fund Cases*, 99 U. S. 700 (1878), Chief Justice Waite, for the court, said: "This declaration [that an Act of Congress is unconstitutional] should never be made except in a clear case. Every possible presumption is in favor of the validity of a statute, and this continues until the contrary is shown beyond a rational doubt. One branch of the government cannot encroach on the domain of another without danger. The safety of our institutions depends in no small degree on a strict observance of this salutary rule." In *Wellington et al., Petitioners*, 16 Pick. 87 (1834), Chief Justice Shaw, for the court, remarked that it was proper "to repeat what has been so often suggested by courts of justice, that when called upon to pronounce the invalidity of an Act of legislation [they will] never declare a statute void unless the nullity and invalidity of the Act are placed, in their judgment, beyond reasonable doubt." In *Com. v. Five Cents Sav. Bk.*, 5 Allen, 428 (1862), Chief Justice Bigelow, for the court, said: "It may be well to repeat the rule of exposition which has been often enunciated by this court, that where a statute has been passed

IV. I have accumulated these citations and run them back to the beginning, in order that it may be clear that the rule in question is something more than a mere form of language, a mere expression of courtesy and deference. It means far more than that. The courts have perceived with more or less distinctness that this exercise of the judicial function does in truth go far beyond the simple business which judges sometimes describe. If their duty were in truth merely and nakedly to ascertain the meaning of the text of the constitution and of the impeached Act of the legislature, and to determine, as an academic question, whether in

with all the forms and solemnities required to give it the force of law, the presumption is in favor of its validity, and that the court will not declare it to be . . . void unless its invalidity is established beyond reasonable doubt." And he goes on to state a corollary of this "well-established rule." In *Ex parte M'Collum*, 1 Cow. p. 564 (1823), Cowen, J. (for the court), said: "Before the court will deem it their duty to declare an Act of the legislature unconstitutional, a case must be presented in which there can be no rational doubt." In the *People v. The Supervisors of Orange*, 17 N. Y. 235 (1858), Harris, J. (for the court), said: "A legislative Act is not to be declared void upon a mere conflict of interpretation between the legislative and the judicial power. Before proceeding to annul, by judicial sentence, what has been enacted by the law-making power, it should clearly appear that the Act cannot be supported by any reasonable intendment or allowable presumption." In *Perry v. Keene*, 56 N. H. 514, 534 (1876), Ladd, J. (with the concurrence of the rest of the court), said: "Certainly it is not for the court to shrink from the discharge of a constitutional duty; but, at the same time, it is not for this branch of the government to set an example of encroachment upon the province of the others. It is only the enunciation of a rule that is now elementary in the American States, to say that before we can declare this law unconstitutional, we must be fully satisfied — satisfied beyond a reasonable doubt — that the purpose for which the tax is authorized is private, and not public." In *The Cincinnati, etc., Railroad Company*, 1 Oh. St. 77 (1852), Ranney, J. (for the court), said: "While the right and duty of interference in a proper case are thus undeniably clear, the principles by which a court should be guided in such an inquiry are equally clear, both upon principle and authority. . . . It is only when manifest assumption of authority and clear incompatibility between the constitution and the law appear, that the judicial power can refuse to execute it. Such interference can never be permitted in a doubtful case. And this results from the very nature of the question involved in the inquiry. . . . The adjudged cases speak a uniform language on this subject. . . . An unbroken chain of decisions to the same effect is to be found in the State courts." In *Syndics of Brooks v. Weyman*, 3 Martin (La.), 9, 12 (1813), it was said by the court: "We reserve to ourselves the authority to declare null any legislative Act which shall be repugnant to the constitution; but it must be manifestly so, not susceptible of doubt." (Cited with approval in *Johnson v. Duncan*, Ib. 539.) In *Cotton v. The County Commissioners*, 6 Fla. 610 (1856), Dupont, J. (for the court), said: "It is a most grave and important power, not to be exercised lightly or rashly, nor in any case where it cannot be made plainly to appear that the legislature has exceeded its powers. If there exist upon the mind of the court a reasonable doubt, that doubt must be given in favor of the law. . . . In further support of this position may be cited any number of decisions by the State courts. . . . If there be one to be found which constitutes an exception to the general doctrine, it has escaped our search."

the court's judgment the two were in conflict, it would, to be sure, be an elevated and important office, one dealing with great matters, involving large public considerations, but yet a function far simpler than it really is. Having ascertained all this, yet there remains a question — the really momentous question — whether, after all, the court can disregard the Act. It cannot do this as a mere matter of course, — merely because it is concluded that upon a just and true construction the law is unconstitutional. That is precisely the significance of the rule of administration that the courts lay down. It can only disregard the Act when those who have the right to make laws have not merely made a mistake, but have made a very clear one, — so clear that it is not open to rational question. That is the standard of duty to which the courts bring legislative Acts; that is the test which they apply, — not merely their own judgment as to constitutionality, but their conclusion as to what judgment is permissible to another department which the constitution has charged with the duty of making it. This rule recognizes that, having regard to the great, complex, ever-unfolding exigencies of government, much which will seem unconstitutional to one man, or body of men, may reasonably not seem so to another; that the constitution often admits of different interpretations; that there is often a range of choice and judgment; that in such cases the constitution does not impose upon the legislature any one specific opinion, but leaves open this range of choice; and that whatever choice is rational is constitutional. This is the principle which the rule that I have been illustrating affirms and supports. The meaning and effect of it are shortly and very strikingly intimated by a remark of Judge Cooley,¹ to the effect that one who is a member of a legislature may vote against a measure as being, in his judgment, unconstitutional; and, being subsequently placed on the bench, when this measure, having been passed by the legislature in spite of his opposition, comes before him judicially, may there find it his duty, although he has in no degree changed his opinion, to declare it constitutional.

Will any one say, You are over-emphasizing this matter, and making too much turn upon the form of a phrase? No, I think not. I am aware of the danger of doing that. But whatever may be said of particular instances of unguarded or indecisive judicial language, it does not appear to me possible to explain the early,

¹ Const. Lim., 6th ed., 68; cited with approval by Bryce, *Am. Com.*, 1st ed., i. 431.

constant, and emphatic statements upon this subject on any slight ground. The form of it is in language too familiar to courts, having too definite a meaning, adopted with too general an agreement, and insisted upon quite too emphatically, to allow us to think it a mere courteous and smoothly transmitted platitude. It has had to maintain itself against denial and dispute. Incidentally, Mr. Justice Gibson disputed it in 1825, while denying the whole power to declare laws unconstitutional.¹ If there be any such power, he insisted (page 352), the party's rights "would depend, not on the greatness of the supposed discrepancy with the constitution, but on the existence of any discrepancy at all." But the majority of the court reaffirmed their power, and the qualifications of it, with equal emphasis. This rule was also denied in 1817 by Jeremiah Mason, one of the leaders of the New England bar, in his argument of the Dartmouth College case, at its earlier stage, in New Hampshire.² He said substantially this: "An erroneous opinion still prevails to a considerable extent, that the courts . . . ought to act . . . with more than ordinary deliberation, . . . that they ought not to declare Acts of the legislature unconstitutional unless they come to their conclusion with absolute certainty, . . . and where the reasons are so manifest that none can doubt." He conceded that the courts should treat the legislature "with great decorum, . . . but . . . the final decision, as in other cases, must be according to the unbiassed dictate of the understanding." Legislative Acts, he said, require for their passage at least a majority of the legislature, and the reasons against the validity of the Act cannot ordinarily be so plain as to leave no manner of doubt. The rule, then, really requires the court to surrender its jurisdiction. "Experience shows that legislatures are in the constant habit of exerting their power to its utmost extent." If the courts retire, whenever a plausible ground of doubt can be suggested, the legislature will absorb all power. Such was his argument. But notwithstanding this, the Supreme Court of New Hampshire declared that they could not act without "a clear and strong conviction;" and on error, in 1819, Marshall, in his celebrated opinion at Washington, declared, for the court, "that in no doubtful case would it pronounce a legislative Act to be contrary to the Constitution."

Again, when the great Charles River Bridge Case³ was before the Massachusetts courts, in 1829, Daniel Webster, arguing, together

¹ *Eakin v. Raub*, 12 S. & R. 330.

³ 7 Pick. 344.

² *Farrar's Rep. Dart. Coll. Case*, 36.

with Lemuel Shaw, for the plaintiff, denied the existence or propriety of this rule. All such cases, he said (p. 442,) involve some doubt; it is not to be supposed that the legislature will pass an Act palpably unconstitutional. The correct ground is that the court will interfere when a case appearing to be doubtful is made out to be clear. Besides, he added, "members of the legislature sometimes vote for a law, of the constitutionality of which they doubt, on the consideration that the question may be determined by the judges." This Act passed in the House of Representatives by a majority of five or six.

"We could show, if it were proper, that more than six members voted for it because the unconstitutionality of it *was* doubtful; leaving it to this court to determine the question. If the legislature is to pass a law because its unconstitutionality is doubtful, and the judge is to hold it valid because its unconstitutionality is doubtful, in what a predicament is the citizen placed! The legislature pass it *de bene esse*; if the question is not met and decided here on principle, responsibility rests nowhere. . . . It is the privilege of an American judge to decide on constitutional questions. . . . Judicial tribunals are the only ones suitable for the investigation of difficult questions of private right."

But the court did not yield to this ingenious attempt to turn them into a board for answering legislative conundrums. Instead of deviating from the line of their duty for the purpose of correcting errors of the legislature, they held that body to its own duty and its own responsibility. "Such a declaration," said Mr. Justice Wilde in giving his opinion, "should never be made but when the case is clear and manifest to all intelligent minds. We must assume that the legislature have done their duty, and we must respect their constitutional rights and powers." Five years later, Lemuel Shaw, who was Webster's associate counsel in the case last mentioned, being now Chief Justice of Massachusetts, in a case¹ where Jeremiah Mason was one of the counsel, repeated with much emphasis "what has been so often suggested by courts of justice, that . . . courts will . . . never declare a statute void unless the nullity and invalidity are placed beyond reasonable doubt."

A rule thus powerfully attacked and thus explicitly maintained, must be treated as having been deliberately meant, both as regards its substance and its form. As to the form of it, it is the more calculated to strike the attention because it marks a familiar and important discrimination, of daily application in our courts, in situ-

¹ Wellington, Petr., 16 Pick. 87.

ations where the rights, the actions, and the authority of different departments, different officials, and different individuals have to be harmonized. It is a distinction and a test, it may be added, that come into more and more prominence as our jurisprudence grows more intricate and refined. In one application of it, as we all know, it is constantly resorted to in the criminal law in questions of self-defence, and in the civil law of tort in questions of negligence,—in answering the question what might an individual who has a right and perhaps a duty of acting under given circumstances, reasonably have supposed at that time to be true? It is the discrimination laid down for settling that difficult question of a soldier's responsibility to the ordinary law of the land when he has acted under the orders of his military superior. "He may," says Dicey, in his "*Law of the Constitution*,"¹ "as it has been well said, be liable to be shot by a court-martial if he disobeys an order, and to be hanged by a judge and jury if he obeys it. . . . Probably," he goes on, quoting with approval one of the books of Mr. Justice Stephen, ". . . it would be found that the order of a military superior would justify his inferiors in executing any orders for giving which they might fairly suppose their superior officer to have good reasons. . . . The only line that presents itself to my mind is that a soldier should be protected by orders for which he might reasonably believe his officer to have good grounds."² This is the distinction adverted to by Lord Blackburn in a leading modern case in the law of libel.³ "When the court," he said, "come to decide whether a particular set of words . . . are or are not libellous, they have to decide a very different question from that which they have to decide when determining whether another tribunal . . . might not unreasonably hold such words to be libellous." It is the same discrimination upon which the verdicts of juries are revised every day in the courts, as in a famous case where Lord Esher applied it a few years ago, when refusing to set aside a verdict.⁴ It must appear, he said, "that reasonable men could not fairly find as the jury have done. . . . It has been said, indeed, that the difference

¹ 3d ed., 279-281.

² It was so held in *Riggs v. State*, 3 Cold. 85 (Tenn., 1866), and *United States v. Clark*, 31 Fed. Rep. 710 (U. S. Circ. Ct., E. Dist. Michigan, 1887, Brown, J.). I am indebted for these cases to Professor Beale's valuable collection of *Cases on Criminal Law* (Cambridge, 1893). The same doctrine is laid down by Judge Hare in 2 Hare, *Am. Const. Law*, 920.

³ *Cap. & Counties Bank v. Henty*, 7 App. Cas., p. 776.

⁴ *Belt v. Lawes*, Thayer's Cas. Ev. 177, n.

between [this] rule and the question whether the judges would have decided the same way as the jury, is evanescent, and the solution of both depends on the opinion of the judges. The last part of the observation is true, but the mode in which the subject is approached makes the greatest difference. To ask 'Should we have found the same verdict,' is surely not the same thing as to ask whether there is room for a reasonable difference of opinion." In like manner, as regards legislative action, there is often that ultimate question, which was vindicated for the judges in a recent highly important case in the Supreme Court of the United States,¹ viz., that of the reasonableness of a legislature's exercise of its most undoubted powers; of the permissible limit of those powers. If a legislature undertakes to exert the taxing power, that of eminent domain, or any part of that vast, unclassified residue of legislative authority which is called, not always intelligently, the police power, this action must not degenerate into an irrational excess, so as to become, in reality, something different and forbidden, — *e. g.*, the depriving people of their property without due process of law; and whether it does so or not, must be determined by the judges.² But in such cases it is always to be remembered that the judicial question is a secondary one. The legislature in determining what shall be done, what it is reasonable to do, does not divide its duty with the judges, nor must it conform to their conception of what is prudent or reasonable legislation. The judicial function is merely that of fixing the outside border of reasonable legislative action, the boundary beyond which the taxing power, the power of eminent domain, police power, and legislative power in general, cannot go without violating the prohibitions of the constitution or crossing the line of its grants.³

¹ *Chic. & Ry. Co. v. Minnesota*, 134 U. S. 418. The question was whether a statute providing for a commission to regulate railroad charges, which excluded the parties from access to the courts for an ultimate judicial revision of the action of the commission, was constitutional.

² Compare *Law and Fact in Jury Trials*, 4 *Harv. Law Rev.* 167, 168.

³ There is often a lack of discrimination in judicial utterances on this subject, — as if it were supposed that the legislature had to conform to the judge's opinion of reasonableness in some other sense than that indicated above. The true view is indicated by Judge Cooley in his *Principles of Const. Law*, 2d ed., 57, when he says of a particular question: "Primarily the determination of what is a public purpose belongs to the legislature, and its action is subject to no review or restraint so long as it is not manifestly colorable. All cases of doubt must be solved in favor of the validity of legislative action, for the obvious reason that the question is legislative, and only becomes judicial when there is a plain excess of legislative authority. A court can only arrest the proceedings and declare a levy void when the absence of public interest in the purpose for which

It must indeed be studiously remembered, in judicially applying such a test as this of what a legislature may reasonably think, that virtue, sense, and competent knowledge are always to be attributed to that body. The conduct of public affairs must always go forward upon conventions and assumptions of that sort. "It is a *postulate*," said Mr. Justice Gibson, "in the theory of our government . . . that the people are wise, virtuous, and competent to manage their own affairs."¹ "It would be indecent in the extreme," said Marshall, C. J.,² "upon a private contract between two individuals to enter into an inquiry respecting the corruption of the sovereign power of a State." And so in a court's revision of legislative acts, as in its revision of a jury's acts, it will always assume a duly instructed body; and the question is not merely what persons may rationally do who are such as we often see, in point of fact, in our legislative bodies, persons untaught it may be, indocile, thoughtless, reckless, incompetent,—but what those other persons, competent, well-instructed, sagacious, attentive, intent only on public ends, fit to represent a self-governing people, such as our theory of government assumes to be carrying on our public affairs,—what such persons may reasonably think or do, what is the permissible view for them. If, for example, what is presented to the court be a question as to the constitutionality of an Act alleged to be *ex post facto*, there can be no assumption of ignorance, however probable, as to anything involved in a learned or competent discussion of that subject. And so of the provisions about double jeopardy, or giving evidence against one's self, or attainder, or jury trial. The reasonable doubt, then, of which our judges speak is that reasonable doubt which lingers in the mind of a competent and duly instructed person who has carefully applied his faculties to the question. The rationally permissible opinion of which we have been talking is the opinion reasonably allowable to such a person as this.

the funds are to be raised is so clear and palpable as to be perceptible to any mind at first blush." And again, on another question, by the Supreme Court of the United States, Waite, C. J., in *Terry v. Anderson*, 95 U. S. p. 633: "In all such cases the question is one of reasonableness, and we have therefore only to consider whether the time allowed in this Statute [of Limitations] is, under all the circumstances, reasonable. Of that the legislature is primarily the judge; and we cannot overrule the decision of that department of the government, unless a palpable error has been committed." See *Pickering Phipps v. Ry. Co.*, 66 Law Times Rep. 721 (1892), and a valuable opinion by Ladd, J., in *Perry v. Keene*, 56 N. H. 514 (1876).

¹ *Eakin v. Raub*, 12 S. & R., p. 355.

² *Fletcher v. Peck*, 6 Cr., p. 131.

The ground on which courts lay down this test of a reasonable doubt for juries in criminal cases, is the great gravity of affecting a man with crime. The reason that they lay it down for themselves in reviewing the civil verdict of a jury is a different one, namely, because they are revising the work of another department charged with a duty of its own, — having themselves no right to undertake *that* duty, no right at all in the matter except to hold the other department within the limit of a reasonable interpretation and exercise of its powers. The court must not, even negatively, undertake to pass upon the facts in jury cases. The reason that the same rule is laid down in regard to revising legislative acts is neither the one of these nor the other alone, but it is both. The courts are revising the work of a co-ordinate department, and must not, even negatively, undertake to legislate. And, again, they must not act unless the case is so very clear, because the consequences of setting aside legislation may be so serious.

If it be said that the case of declaring legislation invalid is different from the others because the ultimate question here is one of the construction of a writing; that this sort of question is always a court's question, and that it cannot well be admitted that there should be two legal constructions of the same instrument; that there is a right way and a wrong way of construing it, and only one right way; and that it is ultimately for the court to say what the right way is, — this suggestion appears, at first sight, to have much force. But really it begs the question. Lord Blackburn's opinion in the libel case¹ related to the construction of a writing. The doctrine which we are now considering is this, that in dealing with the legislative action of a co-ordinate department, a court cannot always, and for the purpose of all sorts of questions, say that there is but one right and permissible way of construing the constitution. When a court is interpreting a writing merely to ascertain or apply its true meaning, then, indeed, there is but one meaning allowable; namely, what the court adjudges to be its true meaning. But when the ultimate question is not that, but whether certain acts of another department, officer, or individual are legal or permissible, then this is not true. In the class of cases which we have been considering, *the ultimate question is not what is the true meaning of the constitution, but whether legislation is sustainable or not.*

¹ Cap. & Count. Bank v. Henty, 7 App. Cas. 741.

It may be suggested that this is not the way in which the judges in fact put the matter ; *e. g.*, that Marshall, in *McCulloch v. Maryland*,¹ seeks to establish the court's own opinion of the constitutionality of the legislation establishing the United States Bank. But in recognizing that this is very often true, we must remember that where the court is sustaining an Act, and finds it to be constitutional in its own opinion, it is fit that this should be said, and that such a declaration is all that the case calls for ; it disposes of the matter. But it is not always true ; there are many cases where the judges sustain an Act because they are in doubt about it ; where they are not giving their own opinion that it is constitutional, but are merely leaving untouched a determination of the legislature ; as in the case where a Massachusetts judge concurred in the opinion of his brethren that a legislative Act was " competent for the legislature to pass, and was not unconstitutional," " upon the single ground that the Act is not so clearly unconstitutional, its invalidity so free from reasonable doubt, as to make it the duty of the judicial department, in view of the vast interests involved in the result, to declare it void." ² The constant declaration of the judges that the question for them is not one of the mere and simple preponderance of reasons for or against, but of what is very plain and clear, clear beyond a reasonable doubt, — this declaration is really a steady announcement that their decisions in support of the constitutionality of legislation do not, as of course, import their own opinion of the true construction of the constitution, and that the strict meaning of their words, when they hold an Act constitutional, is merely this, — not unconstitutional beyond a reasonable doubt. It may be added that a sufficient explanation is found here of some of the decisions which have alarmed many people in recent years, — as if the courts were turning out but a broken reed.³ Many more such opinions are to be expected, for, while legislatures are often faithless to their trust, judges sometimes have to confess the limits of their own power.

It all comes back, I think, to this. The rule under discussion

¹ 4 Wheat. 316.

² *Per* Thomas, J., the Opinion of Justices, 8 Gray, p. 21.

³ "It matters little," says a depressed, but interesting and incisive writer, in commenting, in 1885, upon the *Legal Tender* decisions of the Supreme Court of the United States, "for the court has fallen, and it is not probable it can ever again act as an effective check upon the popular will, or should it attempt to do so, that it can prevail." The "Consolidation of the Colonies," by Brooks Adams, 55 *Atlantic Monthly*, 307.

has in it an implied recognition that the judicial duty now in question touches the region of political administration, and is qualified by the necessities and proprieties of administration. If our doctrine of constitutional law — which finds itself, as we have seen, in the shape of a narrowly stated substantive principle, with a rule of administration enlarging the otherwise too restricted substantive rule — admits now of a juster and simpler conception, that is a very familiar situation in the development of law. What really took place in adopting our theory of constitutional law was this: we introduced for the first time into the conduct of government through its great departments a judicial sanction, as among these departments, — not full and complete, but partial. The judges were allowed, indirectly and in a degree, the power to revise the action of other departments and to pronounce it null. In simple truth, while this is a mere judicial function, it involves, owing to the subject-matter with which it deals, taking a part, a secondary part, in the political conduct of government. If that be so, then the judges must apply methods and principles that befit their task. In such a work there can be no permanent or fitting *modus vivendi* between the different departments unless each is sure of the full co-operation of the others, so long as its own action conforms to any reasonable and fairly permissible view of its constitutional power. The ultimate arbiter of what is rational and permissible is indeed always the courts, so far as litigated cases bring the question before them. This leaves to our courts a great and stately jurisdiction. It will only imperil the whole of it if it is sought to give them more. They must not step into the shoes of the law-maker, or be unmindful of the hint that is found in the sagacious remark of an English bishop nearly two centuries ago, quoted lately from Mr. Justice Holmes¹: —

“Whoever hath an absolute authority to interpret any written or spoken laws, it is he who is truly the lawgiver, to all intents and purposes, and not the person who first wrote or spoke them.”²

¹ By Professor Gray in 6 Harv. Law Rev. 33, n., where he justly refers to the remark as showing “that gentlemen of the short robe have sometimes grasped fundamental legal principles better than many lawyers.”

² Bishop Hoadly's Sermon preached before the King, March 31, 1717, on “The Nature of the Kingdom or Church of Christ.” London: James Knapton, 1717. It should be remarked that Bishop Hoadly is speaking of a situation where the supposed legislator, after once issuing his enactment, never interposes. That is not strictly the case in hand; yet we may recall what Dicey says of amending the constitution of the

V. Finally, let me briefly mention one or two discriminations which are often overlooked, and which are important in order to a clear understanding of the matter. Judges sometimes have occasion to express an opinion upon the constitutionality of a statute, when the rule which we have been considering has no application, or a different application from the common one. There are at least three situations which should be distinguished: (1) where judges pass upon the validity of the acts of a co-ordinate department; (2) where they act as advisers of the other departments; (3) where as representing a government of paramount authority, they deal with acts of a department which is not co-ordinate.

(1) The case of a court passing upon the validity of the act of a co-ordinate department is the normal situation, to which the previous observations mainly apply. I need say no more about that.

(2) As regards the second case, the giving of advisory opinions, this, in reality, is not the exercise of the judicial function at all, and the opinions thus given have not the quality of judicial authority.¹ A single exceptional and unsupported opinion upon this subject, in the State of Maine, made at a time of great political excitement,² and a doctrine in the State of Colorado, founded upon considerations peculiar to the constitution of that State,³ do not

United States: "The sovereign of the United States has been roused to serious action but once during the course of ninety years. It needed the thunder of the Civil War to break his repose, and it may be doubted whether anything short of impending revolution will ever again arouse him to activity. But a monarch who slumbers for years is like a monarch who does not exist. A federal constitution is capable of change, but, for all that, a federal constitution is apt to be unchangeable."

¹ *Com. v. Green*, 12 Allen, p. 163; *Taylor v. Place*, 4 R. I., p. 362. See Thayer's Memorandum on Advisory Opinions (Boston, 1885), Jameson, *Const. Conv.*, 4th. ed., Appendix, note e, p. 667, and a valuable article by H. A. Dubuque, in 24 *Am. Law Rev.* 369, on "The Duty of Judges as Constitutional Advisers."

² Opinion of Justices, 70 Me., p. 583 (1830). *Contra*, Kent, J., in 58 Me., p. 573 (1870): "It is true, unquestionably, that the opinions given under a requisition like this have no judicial force, and cannot bind or control the action of any officer of any department. They have never been regarded as binding on the body asking for them." And so Tapley, J., *ibid.*, p. 615: "Never regarding the opinions thus formed as conclusive, but open to review upon every proper occasion;" and Libby, J., in 72 Me., p. 562-3 (1881): "Inasmuch as any opinion now given can have no effect if the matter should be judicially brought before the court by the proper process, and lest, in declining to answer, I may omit the performance of a constitutional duty, I will very briefly express my opinion upon the question submitted." Walton, J., concurred; the other judges said nothing on this point.

³ *In re Senate Bill*, 12 Colo. 466, — an opinion which seems to me, in some respects ill considered.

call for any qualification of the general remark, that such opinions, given by our judges, — like that well-known class of opinions given by the judges in England when advising the House of Lords, which suggested our own practice, — are merely advisory, and in no sense authoritative judgments.¹ Under our constitutions such opinions are not generally given. In the six or seven States where the constitutions provide for them, it is the practice to report these opinions among the regular decisions, much as the responses of the judges in *Queen Caroline's Case*, and in *MacNaghten's Case*, in England, are reported, and sometimes cited, as if they held equal rank with true adjudications. As regards such opinions, the scruples, cautions, and warnings of which I have been speaking, and the rule about a reasonable doubt, which we have seen emphasized by the courts as regards judicial decisions upon the constitutionality of laws, have no application. What is asked for is the judge's own opinion.

(3) Under the third head come the questions arising out of the existence of our double system, with two written constitutions, and two governments, one of which, within its sphere, is of higher authority than the other. The relation to the States of the paramount government as a whole, and its duty in all questions involving the powers of the general government to maintain that power as against the States in its fulness, seem to fix also the duty of each of its departments; namely, that of maintaining this paramount authority in its true and just proportions, to be determined by itself. If a State legislature passes a law which is impeached in the due course of litigation before the national courts, as being in conflict with the supreme law of the land, those courts may have to ask themselves a question different from that which would be applicable if the enactments were those of a co-ordinate department. When the question relates to what is admitted not to belong to the national power, then whoever construes a State constitution, whether the State or national judiciary, must allow to that legislature the full range of rational construction. But when the question is whether State action be or be not conformable to the paramount constitution, the supreme law of the land, we have a different matter in hand. Fundamentally, it involves the allotment of power between the two governments, — where the line is to be drawn. True, the judiciary is still debating whether a legislature has transgressed its

¹ Macqueen's *Pract. Ho. of Lords*, pp. 49, 50.

limit; but the departments are not co-ordinate, and the limit is at a different point. The judiciary now speaks as representing a paramount constitution and government, whose duty it is, in all its departments, to allow to that constitution nothing less than its just and true interpretation; and having fixed this, to guard it against any inroads from without.

I have been speaking of the national judiciary. As to how the State judiciary should treat a question of the conformity of an Act of their own legislature to the paramount constitution, it has been plausibly said that they should be governed by the same rule that the Federal courts would apply. Since an appeal lies to the Federal courts, these two tribunals, it has been said, should proceed on the same rule, as being parts of one system. But under the Judiciary Act an appeal does not lie from every decision; it only lies when the State law is *sustained* below. It would perhaps be sound on general principles, even if an appeal were allowed in all cases, here also to adhere to the general rule that judges should follow any permissible view which the co-ordinate legislature has adopted. At any rate, under existing legislation it seems proper in the State court to do this, for the practical reason that this is necessary in order to preserve the right of appeal.¹

The view which has thus been presented seems to me highly important. I am not stating a new doctrine, but attempting to restate more exactly and truly an admitted one. If what I have said be sound, it is greatly to be desired that it should be more emphasized by our courts, in its full significance. It has been often remarked that private rights are more respected by the legislatures of some countries which have no written constitution, than by ours. No doubt our doctrine of constitutional law has had a tendency to drive out questions of justice and right, and to fill the mind of legislators with thoughts of mere legality, of what the constitution allows. And moreover, even in the matter of legality, they have felt little responsibility; if we are wrong, they say, the

¹ Gibson, J., in *Eakin v. Raub*, 12 S. & R., p. 357. Compare *Ib.*, p. 352. The same result is reached by the court, on general principles, in the *Tonnage Tax Cases*, 62 Pa. St. 286: "A case of simple doubt should be resolved favorably to the State law, leaving the correction of the error, if it be one, to the Federal judiciary. The presumption in favor of a co-ordinate branch of the State government, the relation of her courts to the State, and, above all, the necessity of preserving a financial system so vital to her welfare, demand this at our hands" (Agnew, J., for the court).

courts will correct it.¹ If what I have been saying is true, the safe and permanent road towards reform is that of impressing upon our people a far stronger sense than they have of the great range of possible harm and evil that our system leaves open, and must leave open, to the legislatures, and of the clear limits of judicial power; so that responsibility may be brought sharply home where it belongs. The checking and cutting down of legislative power, by numerous detailed prohibitions in the constitution, cannot be accomplished without making the government petty and incompetent. This process has already been carried much too far in some of our States. Under no system can the power of courts go far to save a people from ruin; our chief protection lies elsewhere. If this be true, it is of the greatest public importance to put the matter in its true light.²

James B. Thayer.

CAMBRIDGE.

¹ "A singular result of the importance of constitutional interpretation in the American government . . . is this, that the United States legislature has been very largely occupied in purely legal discussions. . . . Legal issues are apt to dwarf and obscure the more substantially important issue of principle and policy, distracting from these latter the attention of the nation as well as the skill of congressional debaters."—1 Bryce, *Am. Com.*, 1st ed., 377. On page 378 he cites one of the best-known writers on constitutional law, Judge Hare, as saying that "In the refined and subtle discussion which ensues, right is too often lost sight of, or treated as if it were synonymous with might. It is taken for granted that what the constitution permits it also approves, and that measures which are legal cannot be contrary to morals." See also *Ib.*, 410.

² La volonté populaire: tel est, dans les pays libres de l'ancien et du Nouveau Monde, la source et la fin de tout pouvoir. Tant qu'elle est saine, les nations prospèrent malgré les imperfections et les lacunes de leurs institutions; si le bon sens fait défaut, si les passions l'emportent, les constitutions les plus parfaites, les lois les plus sages, sont impuissantes. La maxime d'un ancien: *quid leges sine moribus?* est, en somme, le dernier mot de la science politique.—*Le Système Judiciaire de la Grande Bretagne*, by le Comte de Franqueville, i. 25 (Paris: J. Rothschild, 1893).

THE PRESENT LEGAL STATUS OF TRUSTS.

THE term "trust," in its more confined sense, embraces only a peculiar form of business association effected by stockholders of different corporations transferring their stocks to trustees. The Standard Oil Trust was formed in this way, and originated the name "trust" as applied to industrial associations. The trustees had no powers except such as the law confers upon every holder in trust of corporate stocks; to wit, the power to receive dividends and to represent the beneficiaries at corporate meetings.

The first trust agreement to come before the courts on the direct question of legality was that of the Sugar Refiners. It differed materially from the Oil Trust in the fact that corporations were parties to the agreement, and, by virtue thereof, surrendered to the trustees some essential corporate powers. The court held that the arrangement amounted to a partnership of corporations, and the legal principle decided was that corporations could not enter into partnership, nor otherwise combine, except in the mode prescribed by statute.¹

Upon the question whether such a combination was illegal, because in restraint of trade and opposed to public policy, the court declined to express an opinion.

The Standard Oil Trust agreement was an arrangement between individuals owning corporate stocks, and in *State of Ohio v. Standard Oil Co.*,² it was argued that a corporation was an entity separate from its stockholders; that an agreement between all the stockholders of a corporation, in relation to their individual property, to wit, their shares of stock, was not a corporate agreement; that stockholders had the right to assign their stocks in trust; that it was the duty of corporations to enter such transfers upon the books, and afterwards to recognize the trustees as stockholders; that such trust created neither a partnership nor a combination between corporations, nor did the corporations thereby surrender any of their powers.

¹ *People v. Sugar Refining Co.*, 121 N. Y. 582.

² 11 R. & C. L. J. 229.

The court held, following *dicta* in the Sugar Refiners' Case, that the idea that a corporation was a legal entity separate and apart from its stockholders was a mere fiction of law, introduced for convenience, and to be disregarded when necessary for the purpose of justice; that the agreement, having been executed by all the stockholders of the corporation, was a corporate agreement; and further, that the corporation by permitting transfers of stock to be entered upon its books, and by paying dividends to the trustees, made the agreement its own.

These decisions ended this peculiar form of organization; nevertheless it cannot yet be admitted as established law that the idea that a corporation is a legal entity separate from its stockholders is a mere fiction which the courts are at liberty to disregard when it suits their ideas of justice. The judge who pronounced this idea a mere fiction in the Sugar Refiners' Case, in a later case¹ based an important decision upon the principle that the creation of a corporation "merges in the artificial body, and drowns in it the individual rights and liabilities of the members." These principles of law can hardly be called fixed which can thus be used or disregarded at pleasure.

The term "trust," although derived as stated, has obtained a wider signification, and embraces every act, agreement, or combination of persons or capital believed to be done, made, or formed with the intent, effect, power, or tendency to monopolize business, to restrain or interfere with competitive trade, or to fix, influence, or increase the prices of commodities. Space will not permit me to touch upon the law relating to agreements in restraint of trade, nor to agreements or arrangements between persons whose capital is not united in business entered into for the sole purpose of destroying competition, controlling the markets, and increasing prices, nor to agreements between corporations exercising a public franchise. Every lawyer is familiar with a score of cases relative to such agreements and arrangements.

I am not aware of any modern cases which disturb the principles decided in *Salt Co. v. Guthrie*,² *Arnott v. Coal Co.*,³ *Morris Run Coal Co. v. Barclay Coal Co.*,⁴ and many similar cases, provided only it be kept in mind that these cases relate to agreements between competing companies by means of which they undertook

¹ *People v. Coleman*, 133 N. Y. 279.

² 35 Ohio St. 666.

³ 68 N. Y. 559.

⁴ 68 Pa. St. 173.

to regulate each other's business, and to increase prices by artificial means.

We come face to face with a totally different legal problem, and one which has caused and is causing the utmost confusion and difficulty, when we consider that all the effects condemned by law in the cases cited may, and sometimes do, follow as incidents of a large business, whether conducted by an individual, a firm, or a corporation. The word "monopoly," not only as popularly used, but as ordinarily used in legal decisions, means only a large business. Every combination in business, whether by partnership or by corporate organization, prevents competition between the persons combined; and in proportion as the business is widely and successfully conducted, its interference with the competition of others increases. The larger the business, the greater the number of persons and the amount of capital engaged in it, the greater is the power of those who conduct it over production and prices.

The trust problem of to-day is, whether a business of magnitude, on account of these incidents, powers, or tendencies, is illegal.

The great fear of our English ancestors for some centuries was an increase of prices. The increase and debasement of the currency caused high prices, and hundreds of statutes were passed to prevent this inevitable effect. It resulted that both by statute and common law, business which then seemed of magnitude, although it would now seem of very trifling importance, as well as association for business purposes, was not only illegal, but criminal, on account of its supposed tendency to increase prices. The statute 5 & 6 Ed. 6, c. 14, made criminal forestalling, regrating, and engrossing, and all practices having an apparent tendency to increase prices, such as "making any motion by word, letter, message, or otherwise to any person for the enhancing of the price." The statute 28 Geo. 3, c. 53, declared it an unlawful combination for five or more persons to unite in covenant or partnership to purchase coals for sale; and the similar statute of 17 Geo. 3 prevented combinations by partnership or otherwise, in the purchase or sale of bricks. The statute 6 Geo. 1, c. 18, known as the Bubble Act, made it a crime, punishable with death and confiscation of goods, to form voluntary associations and to issue transferable shares; and the courts declared that the clubbing together of numbers of persons with transferable shares, for the purpose of carrying on trade, is calculated to put down individual industry and competition.¹

¹ *Pratt v. Hutchison*, 15 East, 511.

The statutes making illegal and criminal the association of business men and of working men are numbered by hundreds, and were all based upon the same fundamental idea, that association conferred a power to increase wages or prices, and interfered with the industry of individuals. The inevitable tendency of association also was towards the crime of "engrossing," or, as it is now termed, "monopoly."

During the existence of these statutes, business was conducted on a large scale, and immense combinations were formed; but these principally existed by virtue of king's patent or parliamentary grant, and had exclusive privileges of trade. These were actual monopolies, and their evils were intensified by the laws prohibiting voluntary associations having no exclusive privileges. It is claimed that the Bubble Act, before referred to, was passed to prevent competition by voluntary associations against monopolies created by the king's patent.

In the popular mind, and in judicial opinions, no clear distinction was made between monopolies with exclusive privileges, and business associations with no exclusive privileges, and all these, as well as business of magnitude carried on by individuals, were alike condemned as "monopolies." Thus, in 11 Rep. 86, monopoly is said to exist "where one shall engross and get into his hands such merchandise, etc., as none may sell or gain them but himself." In Goodson on Patents, a monopoly is said to exist when one obtains the necessities of life in excessive quantities. In Tomlison's Law Dictionary it is said "monopolies among the people consist of forestalling, engrossing, and regrating, which are still offences at common law."

The extent to which business might be carried on before it was held to pass the criminal line and become "engrossing" or "monopoly" was rather limited. It necessarily depended upon the idiosyncrasies of the several judges before whom cases were heard. Hence it was true in England for several centuries, and is true in the United States to-day, that a man engaged in a large business could have no assurance that he was not transgressing the criminal laws. In fact, business of any considerable magnitude was carried on in spite of legal penalties.

In the case against Waddington,¹ it appears that Waddington purchased 258 acres of growing hops out of a total acreage

¹ 1 East, 143.

of 30,000. Lord Kenyon said: "As to the objection that the quantity purchased could not constitute the offence of engrossing, there was nothing in it, and he referred to a case in which parties were convicted of conspiring to monopolize or raise the price of salt at Droitwich, and they had no doubt of its constituting an offence, although it was not pretended that these persons had intended to engross all or any considerable part of the salt in the kingdom." One Rusly was indicted and convicted for buying and selling on the same day ninety quarters of oats. Grain could not be bought in the sheaf because that had an apparent tendency to enhance the price.¹ A bond with condition not to buy sheep's trotters of any person the obligee bought of, adjudged ill, as tending to a monopoly.²

After the discovery of steam and machinery, association of persons and aggregation of capital for the purpose of enlarged trade became a necessity. Corporations and joint-stock associations struggled into existence, and after much opposition became legal. The bugbear of high prices as a result of the power over prices incident to large business was found to be, as Adam Smith predicted, as unsubstantial as the fear of witchcraft. Hundreds of statutes to prevent restraints of trade were swept from the statute book, with the acknowledgment that such laws had restrained trade and produced the high prices they sought to avert. Other laws were passed permitting few or many persons, at will, to organize joint-stock associations for all legal purposes, and to issue transferable shares. This was a complete reversal of "public policy." Courts in England were slow to recognize this revolution, and until comparatively recent days we find little change in the language of the judges. In case after case, it is asserted that whatever destroys or even relaxes competition, or interferes with the trade of individuals, or confers a power over production or prices, or tends to monopoly, is contrary to public policy. And yet every joint-stock association created under the law, to some extent destroyed and relaxed competition, interfered with the trade of individuals, conferred a power over production and prices, and not only tended to monopoly, but was a monopoly, in the ordinary sense of that word.

In this confused, contradictory, and uncertain condition, the law of England continued until the decision of the highest courts and

¹ 3 Inst. 197.

² Comb. 121.

the House of Lords in the case of *Mogul Steamship Co. v. McGregor*.¹ In this case it is said that "it is perfectly legitimate to combine capital for all the mere purposes of trade, for which capital may, apart from combination, be legitimately used in trade. To limit combinations of capital when used for purposes of competition in the manner proposed by the argument of the plaintiffs would in the present day be impossible, — would only be another method of attempting to set boundaries to the tides." It is pointed out that combination is only another method of competition, and the broad ground is stated "that the policy of our law as at present declared by the Legislature is against all fetters on combination and competition unaccompanied by violence or fraud or other like iniquitous acts. The repeal of the ancient common law and the statutes against engrossing, etc., with the confession that they had discouraged trade and enhanced prices, is referred to as amounting to a "confession of failure in the past, the indication of a new policy for the future." "Thus," continues Fry, L. J., "the stream of modern legislation runs strongly in favor of allowing great combinations of persons interested in trade, and intended to govern or regulate the proceedings of large bodies of men, and thus necessarily to interfere with what would have been the course of traffic if unaffected by such combinations. I therefore conclude that the combination in the present case cannot be held illegal as opposed to the policy of the law."

This case has settled the law of England. In this country, nothing is settled. The law is a chaos of contraction and confusion, and recent statutes have succeeded in making confusion worse confounded. Associations in this land have in number and magnitude surpassed those of any other country. All important business is conducted by corporations, associations, or partnerships. The people of the various States have recognized the benefits of combination, and by amendments of the State constitutions have forced the Legislatures in a majority of the States to cease granting charters with exclusive privileges to favorites, and to grant the benefits of corporate organization equally to all. In the largest number of the States, three or more persons may organize for any legal business by filing a paper, and no limit is placed upon the number of persons who may thus associate, or the amount of capital they may employ.

¹ 21 Q. B. Div. 554; 23 Q. B. Div. 598.

Such legislation is undoubtedly declarative of public policy, and is utterly at variance with the public policy formerly asserted by the common law. But judges and law writers differ widely in their desire or ability to recognize this change of policy. By one American writer it is claimed that the common law against engrossing, regrating, etc., has borne the test of ages, and has been wise and useful, and he laments that the laws are not executed in the United States.¹ By a later author it is claimed that, notwithstanding the statutes and common law against engrossing have been repealed in England, they are still common law in this country,² and many judges continue to repeat the principles of the common law to the effect that whatever interferes with competition or tends to monopoly (*i. e.*, to a large business), or tends to interfere with individuals in trade, is in restraint of trade and contrary to public policy, forgetful of the fact that under such rulings a partnership or corporation could not exist.

A score of cases, however, recognize the fact that public policy has changed; that "the rules of the common law in relation to restraint of trade are considerably modified;"³ "that so far from association restraining trade, it is the most effective instrument of trade; that while associates may not compete among themselves, association stimulates to competition;"⁴ that "a party may legally purchase the trade and business of another for the very purpose of preventing competition;"⁵ that "anti-competitive contracts to avert personal ruin may be perfectly reasonable;"⁶ "that co-operation, though it lessens competition, is not forbidden by public policy."⁷

Leaving this chaos of common law for the present, let us devote our attention to the statutes adopted to regulate trusts, and to the decisions in relation to them.

These statutes bristle with so many difficulties, and are believed to be in so many points contrary to provisions both of their respective State constitutions and of the Federal Constitution, that as yet they have proved of but little effect, and the Populists of the Western and Southwestern States are loudly calling for more effective legislation.

¹ 7 Dane's Ab. 39.

³ *Gibbs v. Gas Co.*, 130 U. S. 396.

² 1 Bishop on Crim. Law, sec. 524.

⁴ *Atcheson v. Mullin*, 43 N. Y. 473.

⁵ *Hornes v. Greeves*, 7 Bing. 735.

⁶ *Diamond Match Co. v. Roeber*, 106 N. Y. 473.

⁷ *Com. v. Carlisle*, 1 Brightly.

Anti-trust laws have been enacted in about twenty States and Territories of the Union. They are all penal laws, and create some new and astonishing crimes. Omitting all tautology, and premising that I use only the word "persons," while the statutes specify also corporations, associations, and partnerships, and that I use the word "agreement" or "attempt," while the statutes specify every possible contract, combination, conspiracy, understanding, arrangement, or act, the enactments may be epitomized as follows: —

In sixteen States it is a criminal conspiracy for two or more persons to agree to regulate or fix the price of any article, or to fix or limit the quantity of any article to be manufactured, mined, produced, or sold. Regulating and fixing prices necessarily include, increasing and reducing prices, but in most of the statutes these are also specified as criminal.

In six States it is a crime for two or more persons to enter into any agreement whereby "full and free competition in production and sale" is prevented.

In two States and one Territory it is a crime for two or more persons to "attempt to monopolize" any article.

In Nebraska, two or more persons are guilty of conspiracy if they agree to suspend or cease the sale of any manufactured products, or by agreeing that the profits of any manufacture or sale shall be made a common fund to be divided among them.

In Texas and Mississippi, besides the crimes of fixing, regulating, increasing, and reducing prices, it is also a crime for persons to settle the price of any article between themselves or between themselves and others.

In New York, it is a crime to enter into any contract whereby competition in the supply or price of articles in common use for support of life and health may be restrained or prevented for the purpose of advancing prices.

It is possible that a construction can be put upon these statutes which will render them compatible with ordinary transactions of bargain and sale, and with the existence of partnerships, corporations, and other business combinations. If so, they will thereby at the same time be made constitutional and harmless.

The prominent defect in all these enactments is, that under any literal construction, they, like the repealed English statutes I have referred to, render business, and particularly business by association, impossible. The evils which the Legislatures supposed to exist solely in trusts or large combinations, exist likewise in the

smallest combination or partnership, the difference being only in degree. How can a partnership exist if it is a criminal conspiracy for two persons to agree to regulate, fix, increase, or decrease the price, or to fix or limit the quantity, of any article they manufacture, produce, or sell, or to agree to suspend or cease the sale or manufacture of any article? Then, too, is not every partnership a restriction of "full and free competition," and does not the village baker, who attempts to do all the business of his little burgh, "attempt to monopolize" the business?

The Federal anti-trust law makes criminal every contract, combination, or conspiracy in restraint of trade or commerce among the States or with foreign nations, and likewise every attempt or combination to monopolize any part of said trade or commerce.

The difficulties of this law are apparent at first sight. First, what is the meaning of the term "restraint of trade," as used in this Act? Does it embrace partial as well as total restraint of trade? Has it its ancient common law meaning, or are the courts at liberty to inquire, without regard to old opinions, what acts or agreements are actually in restraint of trade as it is now carried on through the instrumentality of association? Second, what is the meaning of "monopolize"? Does it mean an exclusive privilege of trade, or does it mean, as more ordinarily used, engrossing, or doing a large business? If the latter, how large must the business be before it can be called monopoly, and is not every effort made to enlarge business an "attempt to monopolize?"

If some of the modern opinions of judges in trust cases are to be followed, we are relegated at once, by the statutes referred to, to the dark ages, when business was necessarily carried on in defiance of law. For instance, in the Sugar Trust Case, in General Term,¹ the court, by Judge Daniels, reasserted the old doctrines of the common law to their fullest extent. The combination was held to be illegal for the reasons, among others, that "it was intended to bring about and secure ulterior advantages in the way of advanced profits to the associates." Its affairs "were to be so managed and carried on as to promote the profit and gain of the associates," and "it is no more than just to infer that the control is to be used to avoid competition and enhance prices, and in that manner, as it is the ordinary expedient to that end, promote the interests and profits of the associates." This is a repetition of the

¹ 6 R. & C. 1. J. 142.

mistake of centuries ago, that business men may not adopt methods which promote their interests and profits, because their desire for profit may cause them to use those methods improperly, and because their advantages may tend to the disadvantage of others. There are four centuries of experience and wisdom between that idea and the language of the judges in *Mogul S. S. Co. v. McGregor*, to wit, that "the instinct of self-advancement and self-protection is the very incentive to all trade;" that "to say that a man is to trade fairly, but that he is to stop short at any act which is calculated to harm other tradesmen, would be a strange and impossible counsel of perfection;" that "it is perfectly legitimate to combine capital for all the mere purposes of trade for which capital may, apart from combination, be legitimately used in trade;" that "to limit combination of capital when used for purposes of competition, would be only another method of attempting to set boundaries to the tides;" that "the object of acquisition of gain is lawful and commendable;" and that as "competition exists when two or more persons seek to possess or to enjoy the same thing, it follows that the success of one must be the failure of another."

The highest court in Michigan¹ took occasion to condemn as illegal a corporation of the State of Connecticut, although the corporation was not before it as a party, and the question of its legality apparently had no pertinency to the question at issue, and was not argued. No fact concerning the corporation was before the court, except that it had a large capital and had purchased competing concerns. Sherwood, C. J., said that its capital would enable it to buy up and absorb all the match business of the United States and Canada, thereby preventing all competition. He denounced the corporation as an artificial person governed by a single motive or purpose, which is to accumulate money, and deemed it doubtful if free government can long exist in a country where such enormous amounts of money are allowed to be accumulated in the vaults of corporations. The fact seems to have been before the court that the price of matches had been reduced. Champlin, J., thought this fact of no importance, because the company had it in its power to raise the price at any time to an exorbitant degree.

The Supreme Court of Nebraska² followed these views, and held to the old common law principle that whatever tends to destroy competition and to create a monopoly is illegal and void.

¹ *Richardson v. Buhl*, 7 R. & C. I., J. 89.

² *Nebraska v. Distilling Co.*, 8 R. & C. L. J. 323.

The same ideas governed in *State of Ohio v. Standard Oil Co.*¹ The court, by Minshal, J., was of opinion that the purpose of the agreement was to form a virtual monopoly, and of so controlling the production and price of petroleum and its products as to destroy competition. "It may be true that it has improved the quality and cheapened the cost of petroleum and its products to the consumer. But such is not one of the usual and general results of a monopoly; and it is the policy of the law to regard not what may, but what usually happens."

I do not agree with the statement that cheapening of price "is not one of the usual and general results of a monopoly." Taking monopoly in the sense here used, — to wit, a large business, — the industrial history of the last four centuries effectually proves the contrary to be the fact.

But the Ohio court goes further, and boldly proclaims large industries to be contrary to the policy of the law. "A society in which a few men are the employers and the great body are merely employees or servants, is not the most desirable in a republic, and it should be as much the policy of the law to multiply the numbers engaged in independent pursuits or in the profits of production, as to cheapen the price to the consumer."

The cases which have arisen in the United States courts under the Federal statute have not, with possibly a single exception, adopted these views of the State courts. The exception is the case of *American Biscuit Co. v. Klotz*,² in the Circuit Court, E. D., of Louisiana, in which it was held that the purchase by the Biscuit Co. of thirty-five subordinate factories was an attempt to monopolize the business.

The most important cases which have arisen under the Federal statute arose out of indictments against officers of the so-called Whiskey Trust.³ These indictments set forth that the defendants had purchased seventy distilleries and manufactured seventy-five per cent of the distillery products of the United States, and that thereby the company was able to control and fix the quantity and price of such products, and to prevent free competition therein, and that they attempted to monopolize the trade by means of rebates to consumers. "If these acts," says Judge Ricks, "are illegal and in restraint of trade, and they constitute a monopoly under

¹ 10 R. & C. L. J. 229.

² 9 R. & C. L. J. 9.

³ *United States v. Greenhut*, N. D. Ohio, 51 Fed. Rep. 205; *In re Terrell*, E. D. New York, 51 Fed. Rep. 213; *In re Greene*, S. D. Ohio, 52 Fed. Rep. 104.

this Act, it may well be denominated an Act to restrain legitimate enterprise, and limit and qualify the ownership in property." Congress "did not intend to limit the amount of capital a citizen should invest in any line of business, or restrain his energy or enterprise in acquiring for himself all the trade possible in such business, provided in so doing he did not by illegal contracts or devices restrain others from pursuing the same business, or deprive the public from enjoying the advantages of the free use of capital, skill, and experience of competitors."

Judge Lacombe, *In re Terrell*, concurs in the views of Judge Ricks. So also did Judge Jackson, now of the United States Supreme Court. After stating, *In re Greene*, that it is not clear what Congress meant by "attempt to monopolize," the learned judge says: "It is very certain that Congress could not, and did not, by this enactment, attempt to prescribe limits to the acquisition, either by private citizen or State corporation, of property which might become the subject of interstate commerce, or declare that, when the accumulation or control of property by legitimate means and lawful methods reached such magnitude or proportions as enabled the owner or owners to control the traffic therein, or any part thereof, among the States, a criminal offence was committed by such owner or owners." He proceeds to show that persons monopolize business in the popular sense just in proportion as the owner's business is increased, enlarged, and developed; but holds that neither the magnitude of business, nor the incidental powers thereby acquired, nor the purpose of regulating prices and controlling traffic, constitutes the monopoly which the statute condemns, but that the monopoly condemned embraces the elements of an exclusive privilege on the one side, and a restriction or restraint on the other which operates to prevent the exercise of some right or liberty. Upon the question of restraint of trade, the learned judge adopts the principles laid down in the decision in the case of *Mogul S. S. Co. v. McGregor*.

Other important cases have arisen under the Federal Act. In *United States v. Nelson*, D. C., Minnesota,¹ an indictment against a number of lumber dealers to advance prices, Nelson, J., said: "An agreement between a number of dealers and manufacturers to raise prices, unless they practically controlled the entire commodity, cannot operate a restraint upon trade, nor does it tend to injuriously affect the public. Unless the agreement involves an

¹ 52 Fed. Rep. 567.

absorption of the entire traffic in lumber, and is entered into for the purpose of obtaining the entire control of it, it is not objectionable to the statute, in my opinion. Competition is not stifled by such an agreement."

Risner, J.,¹ in an indictment under this statute, said: "When contracts go to the extent only of preventing unhealthy competition, and yet at the same time furnish the public with adequate facilities at fixed and reasonable prices, and are made only for the purpose of averting personal ruin, the contract is lawful." In this case, also, monopoly was defined, adopting the language of Judge Christiancy,² as "an exclusive right granted to a few of something which was before a common right."

Putnam, J., in *United States v. Patterson*,³ says: "A contract, combination, or conspiracy in restraint of trade may be not only not illegal, but praiseworthy; as where parties attempt to engross the market by furnishing the best goods or the cheapest."

Space will not permit reference to any others of the numerous cases which have arisen under these statutes, nor is it important, since none of the decisions are final. The Acts of the various States, as well as the Act of Congress, must eventually and finally be passed upon by the Supreme Court of the United States, important questions arising under the Federal Constitution being involved in all the so-called anti-trust legislation. No questions of more moment to the business world are likely to come before that tribunal, and until they are settled, business men must continue their endeavors to enlarge and extend their business under the shadow of criminal indictment. If popular views are adopted in the construction of these statutes, and if they are held to be constitutional, they have, in the language of Judge Coxe, in a late case,⁴ "made unlawful almost every combination by which trade and commerce seek to extend their influence and enlarge their profits," as well as "all agreements by which honest enterprise attempts to protect itself against ruinous and dishonest competition." Still more, they have made criminal all business of magnitude and all business conducted by means of association of persons and aggregation of capital. I have too much faith in our constitutions and our courts to believe such a result possible. *S. C. T. Dodd.*

¹ *United States v. Trans. Miss. Freight Ass'n*, 53 Fed. Rep. 440.

² *Beal v. Chase*, 31 Mich. 521.

³ 55 Fed. Rep. 605.

⁴ *Dueber Watch & Co. v. Howard Watch Co.*, 55 Fed. Rep. 851.

DEATH AS A CIVIL CAUSE OF ACTION IN MASSACHUSETTS.

THERE is no doubt of the right to life. There is no doubt that death is an injury. And yet where one person has been carelessly killed by another, the Supreme Court of Massachusetts has decided that there is no civil remedy. A husband sued for the loss of his wife;¹ a wife for the loss of her husband;² a parent for the loss of his child;² and an administrator for the death of his intestate.³ All the actions failed, not on their merits, but apparently simply because they involved the death of a human being. The first case¹ is an unreported one, and therefore we have not the grounds of the decision. The next two cases² were decided simply on authority, which, meagre as it was, was considered sufficient to express the doctrine of the common law. In the last case³ the opinion was written by Chief Justice Shaw. He offered a ground for the decision, saying that it was a rule of common law that "no actions for injuries to the person survive the death of the person receiving the injury." Undoubtedly this rule often prevented the need of any further explanation, as it did in the case of *Higgins v. Butcher*,⁴ which is believed to be the first case on the subject. But it really offers no satisfactory explanation in itself. In the first place, it does not attempt to explain those cases where the plaintiff sues in his own right, — as, for instance, where a parent sues for loss of service of his child; for here the real party aggrieved is the parent, and he may well be alive at the time of the action.⁵ In the second place, it fails where the suit is brought by one acting in a representative capacity, because, here, after the rule against the survival of actions was changed by statute,⁶ the administrator was as badly off as he was before. For instance, a man was injured, and a cause of action accrued to him. He then died of his injuries, and

¹ An unreported case at Nisi Prius of Supreme Court for Worcester, mentioned by C. J. Shaw in *Kearney v. B. & W. R. R. Co.*, 9 Cush. 108, at p. 109.

² *Carey et ux v. Berkshire R. R. Co.*, 1 Cush. 475; *Skinner v. Housatonic R. R. Co.*, 1 Cush. 475, — both cases decided in one opinion.

³ *Kearney v. B. & W. R. R. Co.*, 9 Cush. 108.

⁴ *Yelverton*, 89.

⁵ See *Broom's Maxims*, 5th ed., p. 904.

⁶ Stat. of 1842, c. 89, sect. 1; now P. S., ch. 165, sec. 1.

the cause of action survived under the statute. The general rule of damages is that the plaintiff "has a right to recover all the damages which are the natural or necessary consequences of the cause of action set forth in the declaration."¹ There was no doubt that death was the natural consequence of the injury, and yet the court held that damages could be recovered only for the suffering, and not for the death.² We are therefore thrown back on authority; and the authority chiefly relied on by the Massachusetts court was Lord Ellenborough's decision in *Baker v. Bolton*.³ The principal of that decision is stated in these words: "In a civil court the death of a human being cannot be complained of as an injury." That is to say, homicide is always a purely criminal affair.

The explanation of Lord Ellenborough's statement is to be sought in history. If we go back far enough in point of time, we shall find that death was originally a private wrong, and that the law underwent a change, the reverse of which is taking place to-day. Sir James Fitzjames Stephen, in his *History of Criminal Law*, points out that in all cases of homicide the wrong was regarded in the early English laws more as a civil offence than as a criminal one. Speaking of the laws of Æthelbirht, he says: "The damage to be paid to the family of the deceased, and the satisfaction to be made to the person whose peace has been broken by the homicide, are much more prominent and more important than what we should term the criminal consequences of the offence. These, however, are not altogether unnoticed."⁴ Then came a period of transition, as Mr. Justice Stephen puts it, "from the view that homicide was a wrong to the survivors, to the view that it was an offence against the state."⁵ In the time of the Year-books the change was complete, and every sort of homicide had become a criminal offence. The conception of moral responsibility, however, was much less developed than it is now. The idea of negligence, in its modern sense, can hardly be said to have existed. The consequence was that almost every accidental killing was criminal, whether the author of it was morally responsible or not.⁶ These accidental deaths

¹ *Per* C. J. Bigelow, in *Prentiss v. Barnes*, 6 Allen, 410.

² *Bancroft v. B. & W. R. R. Co.*, 11 Allen, 34.

³ 1 Campb. 493.

⁴ *History of Criminal Law*, vol. iii. p. 23.

⁵ *Ibid.*, p. 26.

⁶ See cases collected by Hale and by Hawkins: Hale, P. C., vol. i. ch. 39, pp. 471-477; Hawkins, P. C., vol. i. ch. 29, pp. 176-180.

were not manslaughter, or even felonies. They were, if I may use the term, a sort of public tort, or damage done to the community. And the defendant was punished with the loss of his goods, because, as Lord Hale says, "The king hath lost a subject, and that men should be more careful." In fact, Lord Hale, who classifies these cases under the head of involuntary homicides, or homicides *per infortunium*, admits that the question of moral guilt has little to do with it, by calling it, "not the crime, but the misfortune" of the defendant.¹

On the other hand, there is not a trace of any action of tort. And there are two good reasons for this. In the first place, the punishment both in felonious homicides and in homicides *per infortunium* involved the forfeiture of the prisoner's goods. This was the situation which probably gave rise to the saying that a tort is merged in a felony,² and it would equally prevent any civil action in homicide *per infortunium*.³ So long as the prisoner's goods belonged to the Crown, it would be useless, if not dangerously impertinent, for a private individual to try by independent action to get them.

In the second place, there was no great need of an action of tort. The great majority of homicides at that time were felonious, and there already existed in such cases a *quasi* civil remedy for the benefit of the heir or widow of the deceased. This was the vindictive action called appeal.⁴ It was allowed by statute to co-exist with the criminal action.⁵ The defendant, if found guilty, did not pay any damages to the plaintiff, but was punished as he would have been in a criminal case. The real advantage to the plaintiff lay in the fact that he could release his rights, just as the king could grant a pardon. And such releases seem frequently to

¹ "Though the killing of another *per infortunium* be not in truth felony, nor subjects the party to a capital punishment, and, therefore, usually in such cases, the verdict concludes *quod interfecit per infortunium et non per feloniam*, yet the party forfeits his goods, and though he ought to have *quasi de jure* a pardon of course upon the certificate of conviction, yet he is not to be discharged out of prison, but bailed till the next term or sessions to sue out his pardon of course; for though it is not his crime, but his misfortune, yet, because the king hath lost his subject, and that men should be more careful, he forfeits his goods, and is not presently absolutely discharged out of prison, but bailed *ut supra*." — Hale, P. C., vol. i. p. 476.

² Opinion of Bigelow, J., in *B. & W. R. R. Co. v. Dana*, 1 Gray, 83, at p. 97. Opinion of Parker, J., in *Boardman v. Gore*, 15 Mass. 331, at p. 338.

³ See *Shields v. Young*, 15 Ga. 349.

⁴ 1 Comyn's Digest, 627. See also *Goose's Case* and *Perries' Case*, Moore, 164; *Seddons v. Johnson*, 2 Shower, 375; *Smith v. Bowen*, 2 Ld. Raymond, 1288.

⁵ Stat. of Gloucester, 6 Edward 1, ch. 9, and 3 Henry 7, ch. 1. sect. 3.

have had great pecuniary value. This method of proceeding was revived as late as 1818, in the case of *Ashford v. Thornton*.¹ Its barbaric elements were then so prominent that a special statute was passed the next year to abolish it,² and for the next twenty-seven years,—that is, till the passage of Lord Campbell's Act in 1846,³—England was without any sort of a civil remedy in death cases.

Now let us return to the criminal side of the question. Lord Hale left the bench in 1676, and during the next hundred years another change took place. Homicide *per infortunium* disappeared, and the criminal law confined itself more and more to what Lord Hale called crime, or cases of moral guilt. The change was effected by the judges. Foster, who was apparently the first to notice it, says: "I therefore think that those judges who have taken general verdicts of acquittal in plain cases of death *per infortunium* have not been to blame. They have, to say the worst, deviated from ancient practice in favor of innocence."⁴ Blackstone also notices this change, and his editor, Edward Christian, Esq., in 1795 appended the following note: "When homicide does not amount to murder or manslaughter, it is now the universal practice to direct an acquittal."⁵ That was the end of homicide *per infortunium*.

The idea that death was always a criminal matter, however, had more vitality. It had the force of a moral idea. It expressed the sacredness of human life. And it continued to make itself felt. In the English criminal law manslaughter extended to cases of negligence,⁶ whereas other crimes to the person, such as mayhem, battery, and assault, were confined to intentional injuries. In purely civil cases, relief was denied as late as 1808 on the ground, as Lord Ellenborough said, that death was always a criminal matter, not a civil one.⁷ And this same idea again appears, where perhaps it might be least expected, in statute law. In 1787 the Legislature of Massachusetts passed its first statute creating liabil-

¹ 1 Barn. & Ald. 405.

² 9 & 10 Vict. 93.

³ 59 Geo. 3, ch. 46.

⁴ Foster's Crown Law, p. 288 (1762).

⁵ Blackstone, Edward Christian's edition, vol. iv. p. 188 and note.

⁶ Hull's Case, Kelyng, 40; Reg. v. Swindell, 2 C. & K. 230; Reg. v. Franklin, 15 Cox C. C. 163.

⁷ Baker v. Bolton, 1 Campb. 493. — N. B. The doctrine that a tort was merged in a felony was prevalent about this time; see Gibson v. Minet, in the House of Lords, 1794, reported in 1 Henry Blackstone, 569.

ity in death cases.¹ It was an Act making towns liable for accidents caused by defective highways. The Legislature was practically unhampered by precedent.² It could build up the law as it pleased according to principle, and it did so. The seventh section of the Act deals both with cases of personal injury and with cases of death. In cases of personal injury the town was made liable to a civil action. In cases of death the town was liable criminally to be "amerced in one hundred pounds, upon conviction on a presentment or indictment of the grand jury." This deliberate theoretical distinction between personal injuries and death was universally followed by our Legislature down to 1881, when actions of tort were first provided in death cases.³ Even these last actions had a criminal element in them. The amount to be recovered was confined between two limits, like a fine; and between those limits it was to be assessed "with reference to the degree of culpability." And every Massachusetts statute now in force retains these same criminal elements.⁴

There is a modern reason for this, so far as any action by the personal representative for the wrong done to the deceased is concerned. There is no rule known to the common law for estimating damages in such a case. Formerly, when homicide was largely a civil affair, every man had his *wergild*, which was practically the price of his life, and varied according to his rank.⁵ But this conception disappeared long ago, and the only modern rule for civil damages is compensation. And as Mr. Justice Knowlton has said, "There is no mode of estimating compensation for the death of a man."⁶ It is therefore still necessary, before the personal representative can recover for the wrong done to his deceased, for the Legislature to have fixed some arbitrary standard or limit to the amount to be recovered, which is really more in the nature of a fine than of compensation in the ordinary sense.

It remains to consider the rights of the relatives of the deceased.

¹ Passed March 5, 1787; known as statute of 1786, ch. 81.

² No common law liability for defective highways, *Mower v. Inhabitants of Leicester*, 9 Mass. 247. There was an old colonial statute on this point, v. Will. & Mary, ch. 8, but it did not make any material distinction between actions for suffering and actions for death. See also Colonial Laws, p. 13, Act 1648, c. 51.

³ Stat. of 1881, ch. 199.

⁴ Public Statutes, ch. 52, sect. 17; ch. 73, sect. 6; ch. 112, sect. 212; Act of 1883 ch. 243; Act of 1887, ch. 270; Act of 1892, ch. 260.

⁵ Stephen, *Hist. Criminal Law*, vol. i. p. 57.

⁶ *Ramsdell v. N. Y. & N. E. R. R. Co.*, 151 Mass. 245, at p. 249.

A husband is bound to support his wife, and he has a right to her society. Consequently if she receives injuries which either increase his burdens or decrease his rights, he has a cause of action.¹ And a parent has a similar action for injuries to his child.² In case of death, however, both these actions vanish.³ It is submitted that there is no modern reason, theoretical or practical, why they should. They contain all the elements of a common law case. There is a common law right on the part of the plaintiff, an infringement of that right by the defendant, a practical measure of damages,⁴ and no outside considerations. And yet it is easy to see how the court arrived at an opposite conclusion. It first looked for some decision in a death case, or statement, allowing the action, and it found none. It then looked for decisions against such an action, and it found *Baker v. Bolton*,⁵ to the effect that the death of a human being was not the ground for a civil action for damages. It then felt that its researches were complete, and it summed them up by referring to *Baker v. Bolton*, and saying, "Such, then, we cannot doubt is the doctrine of the common law, and it is decisive against the maintenance of these actions." And the majority of the Court of Exchequer in *Osborne v. Gillett*⁶ followed the same course of reasoning. All such reasoning has a tacit premise. It all assumes that somewhere *in nubibus* or *in gremio magistratuum* there exists a complete, coherent, symmetrical body of English law, of an amplitude sufficient to furnish principles which would apply to any conceivable combination of circumstances.⁷ Starting with such a premise, with the evidence it had before it, the court could hardly have avoided its conclusions. And yet with such a premise a failure of justice was almost inevitable. As long as homicide *per infortunium* and the barbarous remedy of appeal existed, any precedent for a purely civil action was impossible. It is only by considering the law as a growth, as a product of evolution, that the disappearance of these barbaric elements can be made to clear the way for a fuller application of the principles of justice.

Last, and at common law least, come the rights of the widow and children. A man, as long as he is alive, is bound to furnish

¹ *Dennis v. Clark*, 2 Cush. 347.

² *Wilton v. Middlesex R. R. Co.*, 125 Mass. 130.

³ *Carey v. Berkshire R. R.*, 1 Cush. 475.

⁴ *Ford v. Monroe*, 20 Wendell, 210.

⁷ See Sir Henry Maine, *Ancient Law*, p. 31.

⁵ 1 Campb. 493.

⁶ L. R. 8 E. 88.

his wife and child with the necessities of life. As long as he is alive, they are in theory provided for; they have a right to support. When this right is infringed by the wrongful act of a third party, all the elements of a common law action again exist. And yet there is no trace of such an action.¹ Practically the widow and children do not often suffer. If the head of the family is injured without being killed, he can, of course, bring an action, in the result of which his family will share. If he is killed, formerly the family were protected by the remedy of appeal, and they are now protected by statute. Most of the Massachusetts statutes provide that the damages recovered in death cases shall be divided between the widow and children.² The last statute, the so-called Employers' Liability Act, distinctly recognizes the claim to support as the basis of the action, by giving the damages to the widow or dependent next of kin.³

There is one other observation to make about these statutes. They are emphatically the product of the times. Formerly, when men were less civilized, machinery almost unknown, and malice with its attendant violence more frequent, the great majority of homicides were felonious. And as a natural consequence the remedy of appeal met the evil of the day by providing for cases of felony. In cases of homicides *per infortunium* the widow and children were left without remedy.⁴ Now, morals being better, and machinery in use almost everywhere, the great cause of homicides is not malice, but carelessness; and consequently the statutes of Massachusetts content themselves with providing for death by negligence. It is now the felonies which are the *casus omissus*. The widow of a murdered man to-day is consequently less protected than she would have been five hundred years ago.⁵

Gustavus Hay, Jr.

¹ Carey *et ux. v. Berkshire R. R. Co.*, was in fact such an action. But, as Baron Bramwell pointed out in *Osborne v. Gillett*, neither the court nor the counsel seem to have paid any attention to that fact, and the case was disposed of on other grounds.

² Public Statutes, ch. 52, sect. 17; ch. 73, sect. 6; ch. 112, sect. 212. See also opinion in *Higgins v. Central N. E. R. R.*, 155 Mass. 176, at p. 181.

³ Act of 1887, ch. 270, sect. 2, and as amended by Act of 1892, ch. 260.

⁴ Stat. of Gloucester, 6 Edward 1, ch. 9.

⁵ For a statute that covers this subject carefully, see Acts of the State of Maine for 1891, chap. 124.

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THE LAW SCHOOL. — Statistics of this year's registration at the Law School are at present necessarily far from complete. The figures available seem to indicate a very considerable falling off from the attendance of a year ago. It is probable that the total loss will approximate fifty. The new rules regulating admission to the School (printed *in extenso* in the May number of the REVIEW) appear to have operated in the direction intended. The Faculty in their recent legislation doubtless had a double end in view; viz., to provide that all members of the Law School, and in consequence all its graduates, should be equipped with a certain minimum of general education, and to retard the threatened pressure of numbers upon the resources of Austin Hall. It will be remembered, also, that a complete change has been wrought by the new rules, in combination with others previously adopted, in the character and standing of special students in the School. The following classes of men only are now eligible to admission as special students:—

(1) Men who hold an academic degree from colleges other than those whose degrees admit to regular standing without examination.

(2) Graduates of any law school which requires a two years' course, and gives its degrees upon examination.

(3) Men who pass the admission examinations now provided.

Those who avail themselves of these provisions for admittance must, in order to remain in the School, pass the same examinations required of regular students. They are given a degree at the end of their course on the same terms as regular students, provided that they have been three full years in residence, and have either made up the deficiency in their entrance requirements, or taken high rank in the School.

The figures now available indicate that the effect of these rigid regulations respecting special students has been precisely what was expected. Perhaps it is safe to say that the total falling off in the numbers of the School will correspond very nearly with the decrease in this class of men. Last year seventy-one special students registered; at the pres-

ent writing only twenty-one are on the books of the School. Other figures for last year are: third-year students, sixty-nine; second-year students, one hundred and nineteen; first-year students, one hundred and thirty-five. The present first-year class will probably be of about the same size as the classes which entered last year and the year before. The second-year class promises to be larger than it has ever been. It was hoped that the same might be said of the third-year class; but present figures point, on the contrary, to a slight decrease in numbers. A careful tabulation of more complete statistics may suggest a reason for this falling off; at present it is certainly to be regarded as unfortunate.

THE diminution in the class of special students is at best, however, only a temporary solution of the problem presented by the constant tendency of numbers to press upon the resources of Austin Hall and of the present teaching force. Free and ample discussion in the class-room, such as is involved in the steady policy of the School, becomes difficult, and even almost impossible, after the classes attain a certain size. It is not possible to state precisely the numerical limit beyond which discussion becomes unprofitable to the class as a whole, but it is certain that entering classes are approaching that limit. Last year the experiment was tried in most of the first-year courses of dividing the class into two sections, conducted (except in the case of Torts) by different instructors. This plan presented at the outset several obvious difficulties, which were fully realized as the year went on. The Faculty have therefore deemed it wise to return to the older system of keeping the class together until it becomes, as it seems likely to become, plainly detrimental to discussion. Except in Contracts, the class entering this month will attend lectures in a body.

NOR the least benefit derived from this return to the older practice of the School is the saving in instructors' time. The Faculty are enabled to arrange for three new half courses, all of them valuable, perhaps even essential, to a curriculum such as the Law School means to offer. Professor Wambaugh, who had a large experience in the teaching and practice of Insurance Law before coming to Cambridge, will devote an hour a week to that topic. Professor Beale will lecture once a week throughout the year on the Law of Damages, and twice a week during the second half year on the Conflict of Laws. Professor Beale's lectures on Damages last year and the year before were found exceedingly useful by the large number of men who attended them, and their repetition, with amplifications and the study of cases, cannot fail to be of great advantage to the School. No such course has been given before at Harvard, though several series of lectures on the general subject have been delivered from time to time, as opportunity offered. It is believed that this is the first attempt in America to treat the Law of Damages thoroughly and scientifically. The questions connected with the Conflict of Laws, which are coming to play a constantly larger and more important part in the practice of the American lawyer, have also received from the law schools of the country far less attention than they deserve. The last lectures given here upon this subject were delivered by Mr. Keener five or six years ago. The course now proposed covers more ground than Mr. Keener's, and promises to be of the greatest value. It is interesting to note that the Law School Association more than a year ago urged upon the School the necessity

of some such action as has now been taken in providing for a careful treatment of this subject.

PROFESSOR THAYER has prepared an excellently arranged index to his Cases on the Law of Evidence, of which owners of the first edition of the Cases may obtain copies gratis by applying to the publisher, Charles W. Sever, Cambridge, Mass., through the dealer of whom they obtained the book. In view of the suddenness with which questions in the law of evidence present themselves in court, it is believed that the index will be of peculiar value to the practitioner.

PUBLICATION OF TESTIMONY RESTRAINED BY ORDER OF COURT.—Considerable interest has been awakened by the recent order of a trial judge in Massachusetts that no report of the evidence in a breach of promise case before him should be published until after the termination of the trial. It was at once assumed that the matter was unfit for publication; but nothing of that sort was disclosed on the trial. It appeared that the order was made at the request of the defendant. The right of the court to make such an order is undoubted. Even without this, any publication tending to create a prejudice may be punished as a contempt. In 24 West Virginia, 416, the court, after a lengthy discussion, affirmed its right to punish for contempt the author of a publication imputing corrupt motives to the court. The same thing was held early in the century in the famous cases against Duane, Wall. C. C. 77. In Mississippi, however, the Supreme Court has denied, on common law principles, the right to punish for contempt anything done outside the court-room. It is believed that that State stands alone in this regard. This power has been exercised more frequently in England than in this country; perhaps never here has just such an order been made. In *King v. Clement*, 4 Barn. & Ald. 218, Clement was punished by fine for disobeying an order precisely like the one under discussion. Section 725 of the Federal statutes limits the right of the Federal courts to punish contempts to "the misbehaviors of any person in their presence." Under this statute a publication outside could not be treated as a contempt. It seems, however, that this cannot control the Supreme Court, for a part of its original jurisdiction conferred by the Constitution must include the right inherent in every court to punish contempts. New York and Pennsylvania have similar statutes. It is supposed that at common law a court could try a case in secret. If this be true, it could admit reporters on terms.

But the rights of the court must be limited to such measures as are required by the due administration of justice in the particular case. The courts are not charged with the duty of preserving public morals. It is hard to see how the publication of matter could be forbidden simply on the ground that it is corrupting. And a court cannot forbid the publication of evidence after the termination of the suit. It has been so held in California. Conceding, then, that the right of a court is thus bounded, the party aggrieved may not always have a satisfactory remedy. Commitment for contempt is a summary proceeding, and the best authorities hold that it is not reviewable by any other court. On a writ of *habeas corpus* the only question is as to the jurisdiction of the court issuing the process. If the court had jurisdiction, its order is final. And since it must decide what a contempt is, it would usually have jurisdiction if the

person was before the court. The abuse of this power to imprison for contempts, and the injustice done, were very crying evils in the last century in England. But bearing in mind the possible dangers incident to all summary measures, it would seem that the dignity of the court might be upheld, and justice furthered, by a more frequent exercise by the courts of their privilege. The words of Lord Hardwicke have lost nothing of their force or meaning in the lapse of a hundred and fifty years: "Nothing is more incumbent upon courts of justice than to preserve their proceedings from being misrepresented; nor is there anything of more pernicious consequence than to prejudice the mind of the public against the persons concerned as parties in a cause before the cause is finally heard." If the infrequent use of this power in the past be urged against its application now, it may be answered that never before has the threatened substitution of trial by newspaper for trial by jury made such action so imperative.

MALICE — MALICIOUS CONSPIRACY. — The decision in the recent English case of *Temperton v. Russell et al.*, L. R. 1893, 1 Q. B. 715, in the Court of Appeal, is interesting in more than one way. By sustaining unanimously the verdict upon the first count, the Court of Appeal (Lord Esher, M. R., A. L. Smith, Lopes, L. JJ.) adds a third well-considered English decision to *Bowen v. Hall*, L. R. 6 Q. B. D. 333, and *Lumley v. Gye*, 2 E. & B. 216, in favor of the doctrine that malicious procurement of a breach of contract is an actionable tort. The court refused to accept the attempted distinction that those were and this was not a case of personal service, Lord Esher saying that *Bowen v. Hall* was "not a case of master and servant," and that the rule was general.

The case also helps towards definition of "malice" and of "malicious." Exactly what those words mean in this new form of action it has not been easy to say. The dictionary definition of malice as a morally evil desire to do injury (Worcester), puts to the law the too difficult question of what is and what is not morally evil. It would seem that here, as in the law of libel, the true meaning of the words must be "without lawful excuse;" since justifiable procuring of breaches of contract will not be actionable, however evil the motive, and mere lack of motive should not be a justification for procuring such breaches. In the case under consideration, Collins, J., charged the jury "that to induce a person who had made a contract with another to break it in order to hurt the person with whom it had been made, to hamper him in his trade, or to put undue pressure upon him, or to obtain an indirect advantage, was in point of law to do it maliciously; and that if the jury were satisfied that the defendants, or any of them, had induced persons to break contracts with the plaintiff, of the existence of which they were aware, and if their object in doing so was to injure the plaintiff in his trade in order to compel him to do something which he did not want to do, that would be 'maliciously' in point of law, and a cause of action would be established." This charge states several hypothetical cases applicable to the first count before the jury, in each of which the judge considered that there would be no lawful excuse, and in each one, from the point of view both of common honesty and of law, it would seem that a man has a right to protection for his contracts. The person who promotes and abets such a breach of faith should, unless he can show some justification, be liable equally with the principal.

The decision on the other count in *Temperton v. Russell* is open to more criticism. Collins, J., "directed the jury in substance that a malicious conspiracy to prevent persons from entering into contracts with another, if followed by damage to the person conspired against, was actionable;" and the Court of Appeal sustained this direction, citing on the point of conspiracy *Gregory v. Duke of Brunswick*, 6 M. & G. 205, 953, and *Mogul S. S. Co. v. McGregor, Gow, & Co. et al.*, 1892, A. C. 25. Upon examination of these cases it does not appear that either can be considered as authority for the decision. The first was a suit for a malicious conspiracy to hiss an actor. Shee, Serjt., for the plaintiff, made election, of his own accord, "to make out a case of conspiracy against both the defendants," and, failing, applied for a new trial on the ground that he might have had a verdict against one. This was rightly refused in an opinion carefully non-committal. Pollock (Torts, p. 268) considers that "the court were of opinion that in point of law the conspiracy was material only as evidence of malice." The second case decided that where the motive of a combination of steamship companies in offering unremunerative rates was to drive another company out of the business, and so secure monopoly, such conduct was not actionable at the suit of the competitor so injured, since "if neither the end contemplated . . . nor the means used . . . were contrary to law, the loss suffered by the appellants was *damnum sine injuria*" (Lord Watson). It is cited apparently for mere hints thrown out *obiter* by Lords Bramwell and Hannen, a small minority of the House then sitting, that there might be good reasons why a combination to do a legal act would be illegal. The fair statement of the previous English law is rather that of Sir Frederick Pollock (Torts, p. 267), that "it seems to be the better opinion that the conspiracy, or 'coafederation,' is not in any case the gist of the action, but is only matter of inducement or evidence." *Temperton v. Russell* is new law upon conspiracy.

Farther than this, the same definition of "malicious" is used and approved in *Temperton v. Russell* concerning both counts, whereas the lawful excuses for persuading a man to do the legal act of refraining from a contract should on principle be infinitely more numerous than those for persuading a man to do the illegal act of breaking a contract. Lord Esher says (*Temperton v. Russell*, at p. 728) that this "seems rather a fine distinction." On the contrary, it is, or should be, a very plain and reasonable one. Here there is no procurement of a breach of contract, or of any civil wrong. The question is under what circumstances of motive the defendants were not justified in combining to use peaceful and legal means to persuade third persons not to enter into new relations of contract with the plaintiff. Referring back to the charge quoted above, we find it ruled that they may not do this "to obtain an indirect advantage." It is not, then, to be wondered at that the Law Quarterly Review (Vol. IX. p. 202) finds the case inconsistent with *Mogul S. S. Co. v. McGregor, Gow, & Co.*, for the persuasion and the results in that case were on principle the same as in this.

The unsettled state of American courts upon the subject is neatly indicated by the two recent cases in California and in Maryland, *Boyson v. Thorn*, 33 Pac. 492, and *Lucke v. Clothing Cutters &c. Assembly K. of L.*, 26 Atl. 505, the one *contra* to the decision on the first count in *Temperton v. Russell*, the other in accord with that on the second count.

THE RIGHT TO PRIVACY. — The recent decision of Judge Colt, sitting in the Circuit Court for the District of Massachusetts, in the case of *Corliss et al. v. Walker Co. et al.*, is especially interesting in relation to what is beginning to be known as the law of privacy. The suit was brought by the widow and children of George H. Corliss, the well-known inventor, to enjoin the defendants from publishing and selling a biography of Mr. Corliss, and from printing and selling his picture with the book. The bill did not allege that the publication contained anything scandalous, libellous, or false, nor that it affected any right of property. Relief was prayed for simply upon the ground that the publication was an injury to the feelings of the plaintiffs, and made against their express prohibition.

The injunction in regard to the publication was denied; but it was granted in regard to the printing and circulation of the portrait. It appears that the defendants obtained from the plaintiffs a copy of a portrait of Mr. Corliss upon certain conditions, with which they did not comply. The granting of the injunction as to the portrait therefore is based upon the ground that it would be a violation of confidence, or a breach of trust, in the defendants, to print and sell it. In dealing with the question of the biography, the court referred to the argument of the plaintiff's counsel that Mr. Corliss was a private character, and that the publication of his life was an invasion of the right of privacy. Judge Colt declared that he could not assent to the proposition that Mr. Corliss was a private character. He was an inventor of reputation, and a public man in the same sense as an author or an artist is a public man. It is hardly probable anybody would dispute the soundness of this part of the court's argument, and upon this ground the decision is doubtless right. But the decision goes still farther: it declares that it is immaterial whether Mr. Corliss is to be regarded as a private or a public character. For this position Judge Colt relies upon the constitutional privilege of freedom of speech and of the press. "Under our laws," he says, "one can speak and publish what he desires, provided he commit no offence against public morals or private reputation." It will be observed that Judge Colt does not recognize the right to privacy as distinct from the law of slander and libel on the one hand, and that of property and contract on the other. On this point the opinion would seem to differ from that in the late case of *Schuyler v. Curtis et al.*, 24 N. Y. Suppl. 509, in which the court enjoined the defendants from erecting a statue of Mrs. Schuyler, on the ground that such an act would be an unwarrantable invasion of the right to privacy. The opinion in the Corliss case refers to *Schuyler v. Curtis*, and says it is not in point, because in that case the right of publication was not in issue. It is difficult to see upon what principle this observation is true, nor is it easy to comprehend in what essential respect the making and erection of a statue in the likeness of a man differs from the publication of his biography, so far as the point under discussion is concerned.

The whole subject of privacy is new, and these two cases are perhaps the only authorities that bear directly upon it. Like all new problems in law it has been brought up by new conditions of life. The newspaper, the telegraph, and the instantaneous photograph have made it infinitely easier to destroy the privacy of individuals, and to expose the victims of morbid curiosity to a degree of inconvenience and pain that was not dreamed of a few years ago. The question is bound to come up more and

more frequently in the courts, and it is believed that the desire of everybody will be that the law may carry forward the tendency of the decision in *Schuyler v. Curtis* rather than adopt the suggestion in *Corliss v. Walker* that the distinction between public and private character is unimportant.

The attention of those who are interested in the matter is directed to the able article by Messrs. Warren and Brandeis, entitled, "The Right to Privacy," in 4 HARVARD LAW REVIEW, p. 193. It is, so far as is known, the only scientific discussion of the subject, and it contains an interesting plea for the protection of "the right to be let alone," as Judge Cooley calls privacy, and also a collection of the few authorities that throw any light upon the subject.

CHARLES INGALLS GIDDINGS, a former editor of this REVIEW, was drowned in Lake Winnepiseogee, N. H., Aug. 17, 1893. He had taken several poor boys from Boston to New Hampshire for a vacation, and lost his life in an heroic effort to save one of the lads who had fallen overboard from a steamer. Mr. Giddings received the Harvard A. B. degree in 1887, and graduated at the Law School *cum laude* in 1890. In addition to the editorial work done during his course, he contributed to the REVIEW for January, 1892, an article on "Restrictions upon the use of Land" (5 H. L. R. 274). Mr. Giddings is understood to have made an excellent beginning in legal practice. Some idea of his professional standing may be gathered from the fact that he was selected to furnish for the American and English Encyclopædia of Law an article on the important and difficult topic, *Ultra Vires*. Of his character we need only say that those who knew him well, regard his death as a fitting climax to a pure and unselfish life.

RECENT CASES.

AGENCY — BROKERS — RELATIONS OF THEIR CUSTOMERS TO THEM. — A customer and a broker buying and selling stocks upon margins stand in the relation of pledgor and pledgee, and the fact that the broker has an implied right of repledging stocks does not change the relation. *Skipper et. al v. Stoddard*, 26 Atl. Rep. 874 (Conn.).

This case shows the common doctrine. See *Markham v. Jaudon*, 41 N. Y. 235, which is perhaps the leading case on the subject; and also *Jones on Pledges*, § 495. The case of *Covell v. Loud*, 135 Mass. 41, is *contra*, the court treating the dealing between the parties as an executory agreement, with power in broker to sell without notice on default by customer.

CONSTITUTIONAL LAW — GEARY ACT — CHINESE EXCLUSION. — An Act of Congress, after continuing the laws then in force for the exclusion of Chinese from the United States, provides for the removal of Chinese not lawfully within this country, requiring that all Chinese laborers entitled to remain in the United States shall obtain certificates of residence from persons authorized by the act to give them, under penalty of removal on failure to do so within one year. On an appeal from the Circuit Court which raised the question of the constitutionality of the Act, the court *held*, that the Act was constitutional. That inasmuch as Chinese laborers cannot under the naturalization laws become citizens, they remain subject to the power of Congress to order their expulsion. That the order of deportation is not a punishment, "but a method of enforcing the return to his own country of an alien who has not complied with the conditions upon the performance of which the government of the nation has determined that his continuing to reside here shall depend," consequently that part of the Constitution securing the right of trial by jury and prohibiting unreasonable searches and punishments has no application. *Fong Yue Ting v. United States*, 13 Sup Ct Rep. 1016. Fuller, C. J., and Field and Brewer, JJ., *dissenting*.

CONTRACTS — ASSIGNMENT OF CHOSE IN ACTION. — A, a creditor of B, assigned his claim for valuable consideration to C. D, another creditor of B, garnisheed the claim, and served notice on B, before C had given notice of the assignment. A statute provided that an attaching creditor should have all the rights of a *bona fide* purchaser. *Held*, that notwithstanding D was the first to notify the debtor, C would prevail, since his assignment was prior in time. *Meier v. Hess*, 32 Pac. Rep. 755 (Ore.).

The court adopts the prevailing American view that where there are successive assignments of a *chose in action*, the prior assignment will prevail, independently of notice to the debtor. This doctrine is laid down in the following cases: *Thayer v. Daniels*, 113 Mass. 129; *Kennedy v. Parke*, 17 N. J. Eq. 415; *Fairbanks v. Sargent*, 104 N. Y. 108. The English view, that the assignee who first gives notice to the debtor will be protected, originated in *Dearle v. Hall*, 3 Russ. 48, and has been followed in some jurisdictions in this country. See *Campbell v. Day*, 16 Vt. 558; *Vanbuskirk v. Insurance Co.*, 14 Conn. 141; *Murdock v. Finney*, 21 Mo. 139.

CONTRACT — BREACH — MEASURE OF DAMAGES. — A contracted to do certain work for B, who broke the contract after part performance by A. In this action by A's assignee, the declaration contained a count for breach of contract, and also counts "for labor expended and expenses incurred in and about the prosecution of the work." Plaintiff elected to sue on the *quantum meruit*. *Held*, "the general rule is well settled that a party to a contract where labor is to be performed, upon a breach of that contract by the other party, has two remedies open to him. He may sue upon the contract and recover damages for its breach; or he may ignore the contract, and sue for services and labor expended, and expenses incurred from which he has derived no benefit. In case he pursues the latter remedy, the measure of damages as to services is not necessarily the contract price, . . . but he may recover what the services are reasonably worth, although in excess of the rate fixed by the contract." *Hemminger v. Western Assurance Co.*, 54 N. W. Rep. 949 (Mich.).

The plaintiff in this case has an adequate remedy in an action on the contract, and there is no reason why he should be allowed to sue in quasi-contract. That he has the option, however, must be admitted as settled law; and as to allow a quasi-contract where there is no necessity for it is inconsistent with the nature of that action, this rule must be regarded as an anomaly. In regard to the measure of damages where plaintiff elects to sue in quasi-contract, the statement by the court is certainly wrong on principle, and seems to be supported by no authority outside of Michigan. The action is founded solely on principles of natural justice, and there can surely be no justice in allowing the plaintiff to recover more than the valuation he had himself placed on his work.

CONTRACTS — MALICIOUS INTERFERENCE WITH RIGHTS UNDER ORGANIZED LABOR. — Defendants, who were members of a committee of trade unions, induced persons who had entered into contracts with plaintiff to break their contracts and not to make further ones with plaintiff, by threatening that workmen would be withdrawn from their employ. *Held*, that an action lay for maliciously procuring the breach of contract, and also for maliciously conspiring to injure plaintiff by preventing persons from entering into contracts with him. *Temperton v. Russell* (1893), 1 Q. B. 715 (Eng.). For a discussion of this case, see the Notes.

CONTRACTS — MALICIOUS INTERFERENCE WITH RIGHTS UNDER ORGANIZED LABOR. — Plaintiff was a non-union man working for a clothing house under a contract by which he could be discharged at the end of any week, but he was told that he would be permanently employed. The local union labor organization informed his employers that unless plaintiff were discharged they would have to inform all labor organizations of the city that the house was a non-union one. In consequence of this threat, and for no other reason, plaintiff was discharged. *Held*, that plaintiff had good cause for action against the labor unions for maliciously interfering with his rights. *Lucke v. Clothing Cutters' and T. Assembly, No. 7507, K. of L.*, 26 Atl. 505 (Md.). See note on *Temperton v. Russell*.

CONTRACTS — MISSING-WORD COMPETITIONS. — The successful competitors in a missing-word competition brought this action, seeking administration of the trusts of the money in the defendant's hands for distribution among the winners. *Held*, that missing-word competitions are decided by chance, and are therefore covered by the Acts against lotteries; and since the trusts arise out of an illegal transaction, the court will not assist in the administration of them. *Barclay v. Pearson* (1893), 2 Ch. 154.

CONTRACTS — VESTED RIGHTS — ELECTRIC LIGHT COMPANIES. — The orator had entered into a contract with a village to supply it with lights, and established a plant in accordance with the terms of that contract, using a low voltage system. Defendant

later erected poles and strung wires with the consent of the trustees of the village, sending through their wires a current of high voltage. The wires of defendant were placed so near those of the orator that there was danger of induction, the result of which would be the destruction of the buildings which the orator lighted; and for this they would be responsible in damages. *Held*, an injunction will be granted to restrain the defendants from such interference. *Rutland Electric Light Co. v. Marble City Electric Light Co.*, 26 Atl. Rep. 635 (Vt.).

This question does not seem to have arisen in Vermont. The case of *Hudson Telephone Co. v. Jersey City*, 49 N. J. L. 624, and other similar cases rendered this decision necessary, however. These cases decided that after a franchise to erect poles and wires had been granted, and money expended on the faith of it, it could not be revoked. Although no attempt at a real revocation was made here, what was done amounted to the same thing; for if the defendants were allowed to operate their plant in the manner stated, the plaintiff's contract with the city was practically of no benefit to them. For a discussion of this subject, see Keasbey on Electric Wires, pp. 35 and 36.

CONTRACTS VOID AS AGAINST PUBLIC POLICY.—By a Statute P. L. 1889, p. 462, certain provisions were made for the selection of papers to publish the laws, one of which was that the paper having the largest circulation was to be chosen. Plaintiff and defendant agreed that, in order to allay and stop the rivalry existing between them, in their efforts to obtain the selection and business of publishing the laws of the State, for their respective newspapers, for a term of two years, in case of the designation of either paper to publish the laws, the net amount received for this service should be equally divided between the two papers, and that their newspapers should be alternately selected. *Held*, this contract was void, as against public policy, being in contravention of the statute, which was intended to secure the publication of the laws through that organ which would bring them before the eyes of most men. *Brooks et al. v. Cooper*, 26 Atl. Rep. 978 (N. J. L.).

This very able opinion contains a thorough *résumé* of all the cases bearing on the subject. The soundness of the decision is apparent.

CRIMINAL LAW — INTERSTATE RENDITION — POWER TO TRY FOR DIFFERENT CRIME.—Persons brought into one State from another by extradition proceedings to answer a charge of crime may be tried on an indictment for a different crime. *Lascelles v. State*, 13 Sup. Ct. Rep. 687, affirming the decision of the Georgia court in the same case, 16 S. E. Rep. 945; 7 Harv. Law Rev. 52.

Authorities on this point are somewhat divided, but the trend of recent decisions has been towards the result reached in this case. See 6 Harv. Law Rev. 158, and *Id.* 320.

EQUITY — INJUNCTION RESTRAINING BREACH OF RIGHT TO PRIVACY.—*Held*, that a court of equity, at the instance of one of the relatives of a deceased person, will enjoin the making and placing on public exhibition of a statue of the decedent by unauthorized persons. *Schuyler v. Curtis*, N. Y. 24 Supp. 509.

See an article on the "Right to Privacy," by Messrs. Warren and Brandeis, in 4 Harv. Law Rev., p. 193.

EVIDENCE — DYING DECLARATIONS.—Deceased said, "He was hurt bad; he was beat to death," and then stated the circumstances of the quarrel. He died in a few hours. *Held*, that the statement was not admissible as a dying declaration, because it was not certain that deceased thought he was going to die. *Justice v. State*, 13 So. Rep. 658 (Ala.).

This decision shows how rigorously an exception to the rule against hearsay evidence is treated by courts nowadays. Formerly, dying declarations were received in civil as well as criminal cases (*Wright v. Littler*, 3 Burr. 1244); but now they are admissible only in cases of homicide where the death of the declarant is under investigation.

EVIDENCE — STATEMENTS OF AN ATTORNEY.—Action to recover damages for accident caused by defendant's alleged negligence. Defendant's counsel offered as evidence a letter stating what purported to be the facts of the case, written in reply to an inquiry of the defendant's by a clerk of the attorney whom the plaintiff had requested to present the claim. *Held*, the letter was admissible. Field, C. J., and Lathrop, J., dissented, on the ground that the communication was a confidential one, which the attorney had no business to disclose. *Loomis v. N. Y., N. H., & H. R. Co.*, 34 N. E. Rep. 82 (Mass.).

The majority view seems the better one. The plaintiff gave the attorney power to arrange a settlement. To do this he would have to state the facts on which the demand was founded. The letter written by the attorney's clerk under the former's direction purported to state them. Looking at it in this way, it is hard to see why the communication was a breach of confidence. Cf. 1 Greenleaf Ev. § 186, and cases cited.

PUBLIC OFFICE—MANDAMUS.—Respondent was duly appointed town clerk, but refused to serve. *Held*, that mandamus will lie to compel acceptance of the office. *People ex rel. German Ins. Co. v. Williams*, 33 N. E. 849 (Ill.).

The point is a novel one in this country. The careful examination of authorities by Shope, J., shows that there is a common law duty upon all citizens to hold office if duly elected or appointed thereto, in direct contradiction of the popular idea that a man can decline office or resign therefrom at his pleasure.

QUASI-CONTRACTS—TAXATION—VOLUNTARY PAYMENTS UNDER MISTAKE OF LAW.—The relator was a corporation exempt by statute from taxation. It voluntarily made a report to the comptroller, and without objection paid taxes on the basis of that report. By a statute the comptroller is empowered to readjust taxes illegally paid by a corporation. *Held*, notwithstanding the statute, the relator cannot recover taxes voluntarily paid under a mistake of law. *People v. Wemple*, 23 N. Y. Supp. 661.

The decision is interesting, as showing a very strict construction of an important statute in accordance with the common law rule against recovery of money paid under mistake of law.

REAL PROPERTY—EQUITABLE MORTGAGE.—Holder of an unrecorded equitable mortgage has a claim against the mortgagor's assignee for benefit of creditors which takes priority over the rights of such creditors. *Martin v. Brown et al.*, 26 Atl. Rep. 823 (N. J.).

Case is interesting, owing to the valuable discussion by Pitney, V. C., as to who are entitled to the rights of *bona fide* purchasers. He seems to consider the law as settled in New Jersey, *contra* to Massachusetts decisions, that a legal mortgagee of land, taking it as security for a past debt, is postponed to a prior equitable mortgagee who gives value at the time.

REAL PROPERTY—ESTATE OF LESSEE OF STALL IN A MARKET.—*Held*, that the lessee of a stall in a market has no such estate as will enable him to maintain trespass against a railroad company which, by eminent domain, has taken possession of the market building by virtue of a bond delivered to the market company. *Strickland v. Pennsylvania R. Co.*, 26 Atl. Rep. 431 (Pa.).

This decision is correct. It rests upon the peculiar position of the holder of a stall in a market, who resembles the lessee of a store much less closely than the holder of a pew in a church. He is merely holder, by virtue of his lease, of a license to sell at the particular stall assigned to him such articles at such times as the municipality may direct. He has no right in the ground covered by his stall.

REAL PROPERTY—RIGHTS OF PEW-HOLDERS.—The plaintiff owned a pew in a church. The trustees sold the building, and with the moneys erected another similar to the first in the arrangement of its pews. To get the congregation to assent to the sale, the trustees had represented that each pew-holder should have a seat in the new church corresponding in location to his seat in the old. *Held*, it was the duty of the trustees to tender such a pew upon the payment of such sum as in equity the plaintiff ought to pay, if the cost of the new structure exceeded the proceeds of the old one and the sums in the treasury of the society. If they failed to allot such a pew, he should be indemnified for his loss. *Mayer v. Temple Beth El*, 23 N. Y. Supp. 1013 (Com. Pl.).

This case seems in accord with what little authority there is upon the point involved. The same result is reached in the case of St. George's Church, reported in Hoffman, Ecc. Law, 250.

REAL PROPERTY—WATERCOURSES—PRIOR OCCUPANCY.—*Held*, where the owner of a dam across a stream does not set back the water to a greater extent than is necessary for the operations of his mill, nor pollute or divert the water, it is error, in an action against him by a junior proprietor of the dam below his, to perpetually enjoin him from entirely cutting off or diminishing the natural flow of the stream so that plaintiff shall not, at all times, have a reasonable supply of water therefrom. *Mumfower v. City of Bristol*, 17 S. E. Rep. 853 (Va.).

The court base their decision wholly on the ground of prior occupancy, and follow the decisions of Massachusetts (16 Gray, 43), Maine (56 Me. 197), and Kentucky (78 Ky. 463). The great weight of authority, however, is strongly against the proposition, that prior occupancy gives any such rights as are here claimed. See Gould on Waters, §§ 226, 227.

STATUTES—IMPEACHMENT OF.—*Held*, the fact that a bill has been signed by the presiding officers of the general assembly, approved by the governor, and duly deposited in the office of the secretary of state, shows, in the absence of anything on its face to the contrary, that it has become a law, and it is not competent to impeach the same by the journals of the two Houses or other evidence. *State v. Platt*, 2 S. C. 150, and *State*

v. Hagood, 13 S. C. 46, overruled. *State ex rel. Hoover v. Town Council of Chester*, 17 S. E. Rep. 752 (S. C.).

It was here claimed that the speaker of the House of Representatives had altered the bill in question, after its passage, to suit himself, and that it would so appear if the journals should be examined. The ruling of the court was in accordance with a late ruling of the United States Supreme Court, in *Field v. Clark*, 143 U. S. 649. The point is a hotly contested one. Connecticut, Indiana, Iowa, Louisiana, Maine, Mississippi, Nevada, New Jersey, New York, North Carolina, and Texas hold that the enrolled Act is conclusive; while Alabama, Arkansas, Colorado, Florida, Illinois, Kansas, Maryland, Michigan, Minnesota, Nebraska, New Hampshire, Ohio, Oregon, South Carolina, Tennessee, Virginia, West Virginia, Wisconsin, and Wyoming hold that the journals control the enrolled Act. The authorities are well collected in 143 U. S. p. 661, note.

TORT — CONTRACT — CONCURRENT REMEDIES. — The defendant, a commissioner of highways, agreed with the plaintiff to extend a ditch into the highway so as to carry off surface water which collected on the plaintiff's land. Defendant dug the ditch so carelessly that it gathered instead of draining off the water. In an action of tort which the plaintiff brought to recover for the damage caused by the water, it was objected that plaintiff's remedy was contract. The court, however, allowed the action, giving damages only for injury caused by water brought on to the land by the ditch. *Fromm v. Ide*, 23 N. Y. Supp. 56.

The common instance where an action of tort is allowed for damages resulting from breach of contract is that of a common carrier or innkeeper who loses goods left in his charge. Judge Cooley (Cooley on Torts, p. *91) says, "These are exceptional cases." The reasoning of the court in the present case seems satisfactory, however, namely, that the defendant has committed a breach of the duty he owed the plaintiff not to injure his property while performing the contract. On this point see Cooley on Torts, § 91; Clerk & Linsdell on Torts, 2; Pollack on Torts, 463 and 466.

TORTS — LIBEL — MISTAKE IN NAME. — In an action against a newspaper for libel, it appeared that plaintiff was a real estate and insurance broker of South Boston, and that, in an article giving an account of a person who was fined in a police court, the paper described the prisoner as "H. P. Hanson, a real estate and insurance broker of South Boston," while the name of the prisoner was A. P. Hanson, also a real estate and insurance broker of South Boston, and that the intention was to describe the proper person, and that plaintiff's name was used by mistake. *Held* (Holmes, Morton, and Barker, JJ., *dissenting*), that plaintiff could not recover; that it was not sufficient to show that plaintiff's name was used in the article, but it must be further shown that he was the person whom the article was intended to describe. *Hanson v. Globe Newspaper Co.*, 34 N. E. Rep. 462 (Mass.).

The court seem to have taken the ground that defendants are not liable, because they did not intend to refer to the plaintiff. It is submitted that this ground cannot be supported. The liability of defendants is to be measured by the natural effect of their acts, and not by their intention. The publication of such an article must certainly have been understood by the public as referring to the plaintiff, and his character must have been correspondingly damaged. The fact that defendants did not mean to refer to plaintiff is no excuse. The effect, not the intention, is material. *Odgers on Libel and Slander*, pp. 93, 264. There being no question of privilege raised here, "malice in fact need not be proved; the words are actionable if false and defamatory, although spoken or published accidentally or inadvertently." *Odgers on Libel and Slander*, pp. 5, 266.

TRUSTS — STATUTE OF FRAUDS. — A conveyed certain land to B by a deed absolute in form, but it was orally agreed that B should hold the land in trust for A; there was no consideration for the conveyance. A entered into possession, and expended considerable money on the faith of this agreement. This was an action by C, to whom A was indebted, to have B declared trustee of the land for A. *Held*, that the express trust, being oral, was void, under the Statute of Frauds, and could not be enforced. *Flour Mill Co. v. Kistler*, 54 N. W. Rep. 1063 (Minn.).

This is in accordance with the weight of authority in this country, but in England the opposite result would be reached. The express trust cannot be enforced, on account of the statute; but as the grantee has given nothing for his title, it is unfair that he should keep the beneficial interest for himself. In England, on principles of natural justice, equity would raise a constructive trust for the benefit of the grantor. It would seem that this rule is the sounder one, as by it the just result is obtained, with no violation of the statute.

WILLS—CONSTRUCTION—EXTRINSIC EVIDENCE.—The testator bequeathed property to A, B, C. Hearing of their death, he inserted "or to their heirs" in the will, added "deceased" after the name of each legatee, and then republished the will. *Held*, the legacies will not lapse, since the additions indicate words of substitution. The court is entitled to put itself in the position of the testator, and to do this may resort to extrinsic evidence of the circumstances under which the additions were made. *In re Gilmor's Estate*, 26 Atl. Rep. 614 (Pa.).

In *Barnett's Appeal*, 2 Rawle, 28, "or his heirs" was held to amount to "and his heirs," on the ground that "the inference to be drawn from the use of a copulative instead of a disjunctive is too feeble." The principal case would, doubtless, have been similarly decided, had not the court availed itself of the extrinsic evidence, which clearly showed the legacies were never meant to lapse. The treatment of the case is clear and scientific. There is no confusing talk about "latent ambiguities," but the view is adopted which is gaining ground, that a written instrument may be construed in the light of all the extrinsic facts.

REVIEWS.

THE LAWS OF WILLS. By J. B. Cassoday, LL. D. West Publishing Co., St. Paul, 1893, 8vo. pp. 310.

Cassoday on Wills will prove valuable in making a comprehensive review of the subject at short notice. The practising lawyer will find it elementary and didactic rather than argumentative.

To the scholar it will prove unsatisfactory from its lack of logical division and scientific thoroughness, such a topic as the admission of extrinsic evidence in aid of the interpretation of a will being dismissed with the quotation of a single paragraph from Wigram.

As a statement of existing Wisconsin law, the book will be valuable in many instances to the students in Judge Cassoday's courses.

C. P. H.

LAW OF FOREIGN CORPORATIONS. A Discussion of the Principles of Private International Law and of Local Statutory Regulations applicable to Transactions of Foreign Companies. By William L. Murfree, Jr. pp. xlv, 376. St. Louis: Central Law Journal Co., 1893.

This is the first distinct treatise on a growing branch of the law, and one extremely important under our Federal system. The most interesting chapters are those relating to the right of a State to control within its borders a corporation chartered by another State as affected by the Constitution of the United States. A more thorough examination of the constitutional principles involved would have been valuable. However, the author does state with great force his objections to the present doctrine of the Supreme Court that a corporation is a citizen of the State creating it, so as to give jurisdiction to the Federal courts, although not a citizen within the privileges and immunity clause. This doctrine of the courts was by implication adopted by Congress in the Judiciary Act of 1887, where for the first time is found the term "corporation" in a statute giving jurisdiction,—a fact not mentioned by Mr. Murfree. But for the most part little more has been attempted in the book than a statement of the decisions. It must be said, however, that this has been well done. The arrangement is very good.

E. B. B.

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REFORM IN CRIMINAL PROCEDURE.

WITHIN the present century some changes have been made in criminal pleading and procedure, in England and in this country. Quite generally the burdensome requirement of setting out *in extenso*, in perjury indictments, the proceedings in the course of which the perjury was committed, has been abolished. Certain matters of mere form in indictments, — as the allegations “against the statute in such case made and provided,” “against the peace of the Commonwealth,” “with force and arms,” — have been dispensed with. It is now quite generally provided that merely formal objections to an indictment may be disregarded or must be made at an early stage, and that an allegation of ownership is satisfied by part ownership or by possession. Changes of this character, while they simplify to some extent the labors of the criminal pleader and lessen the effect of unimportant mistakes, are, after all, superficial. Moreover, such alterations as have been made, have been made upon no general scheme or principle.

In England, certain more radical changes have been made, as, for instance, in the provisions for the amendment of indictments, and in the provision that upon an indictment for larceny a conviction may be had for embezzlement. Legislation of this latter character would be impossible here in this country, because it would be unconstitutional; and, indeed, in many respects the question of

reform in criminal procedure must, in this country, for constitutional reasons, be approached from a different point of view from that of England.

Such improvements as have thus far been introduced in criminal pleading and procedure in England and in this country are probably due, partly to a general change in public opinion, partly to suggestions of prosecuting officers, based upon particular inconveniences forced upon their attention. They have rarely, if ever, sprung from systematic efforts for improvement. Bankers, warehousemen, mechanics, ship-owners, manufacturers, mill-operatives, are organized, are respected classes, and have legitimate common interests which they can bring to the attention of the Legislature. Crime has no such representatives. Respectable people do not expect to commit crimes, and do not plan in advance for a proper criminal procedure; the criminal class, in so far as there may be said to be a criminal class, would have no standing if it undertook to present a scheme of criminal law reform, in view of prosecutions which it expected in the future to have to meet; the general public has no accurate knowledge as to the imperfections of criminal procedure; and it is much easier for prosecuting officers to meet or submit to the difficulties of pleading and procedure that confront them, than to press reforms through the Legislature. It is easy enough, therefore, to see why no systematic reform of criminal law or criminal procedure should have been made, either in England or in this country, in spite of some occasional efforts to that end; and yet there is no branch of the law, and no range of affairs, in which reform is more needed, and probably none in which it could be so simply and safely effected.

It is proposed in this article to suggest certain improvements in criminal procedure and pleading.

1. The grand jury undoubtedly had its use in early times, either as a prosecuting body or as a bulwark against prosecutions. To-day it is nothing but a burdensome incumbrance. Theoretically, it surveys the whole field of human action within the county or district, and of its own motion presents to the court charges against those whom it believes to have broken the laws. Practically, it is a mere *ex parte* tribunal to hear cases sent up to it by committing magistrates, or presented to it by the prosecuting officer. It is, in ninety-nine cases out of a hundred, a mere trial court, handicapped by hearing witnesses only for one side. A little cross-examination or evidence in defence will often entirely break down a good *prima*

facie case; but there is no cross-examination, and nothing in defence, before the grand jury. Moreover, the grand jury is, in practice, mere clay in the hands of the prosecuting officer. He, in practice, determines what witnesses shall be called, conducts the examination of witnesses, and advises the grand jury as to the law. He has it in his power to make a case appear stronger than it is, or weaker, or to defeat it by an adverse opinion as to the law, and this absolutely without responsibility to the public. The grand jury simply serves to shield him from a responsibility that he ought to bear. In so far as the grand jury is to be viewed as a supervising and prosecuting body, its duties are better performed by the police and the prosecuting officers; in so far as it is viewed as a protection to individuals against unjust prosecution, not only is it ineffectual in that respect, but its duties can be much better performed by preliminary tribunals. It is undoubtedly true that of cases sent by committing magistrates to the grand jury, the grand jury throws out a considerable percentage. From this it might seem to follow that the grand jury is a protection to defendants. This, however, is a superficial view. Under the present grand jury system, committing magistrates are required by law to determine, not whether there is a case against the accused, but merely whether there is probable cause to believe him guilty: they are not to pass upon the question of sufficiency of evidence to convict. If the grand jury were abolished, and its duties were vested in the magistrates, they would, upon the preliminary hearing, themselves throw out those cases of mere probable cause which they now send to the grand jury for sifting. A trained magistrate, with the responsibility of his office, sitting in open court, subject to public criticism, and hearing the defence, would afford much more protection to innocent persons against the burden of an unnecessary jury trial than the grand jury, hearing only one side, and sitting in secret.

In some of our States the grand jury does not now exist. In those States, it is believed, no one would think of introducing it. In most, if not all the States that still have the grand jury, the State constitution probably requires it, for serious crimes, as does the Federal constitution for Federal prosecutions. There is nothing in the constitution of the United States, however, requiring a State to maintain this institution,¹ and any State can, therefore, by amendment of its own constitution, abolish it. An amendment of

¹ *Hurtado v. California*, 110 U. S. 516.

the constitution of the United States would be necessary to the abolition of it in Federal procedure.

The constitutional requirement of prosecution by the grand jury, where it exists, probably nowhere extends to all classes of crime. The rule upon this point is not uniform; but in most if not all jurisdictions, prosecutions may within certain limits be made by complaint or information. In most if not all the States, and in the Federal jurisdiction, many offences are at present, by reason of the character of a theoretical maximum penalty, required to be prosecuted by indictment, which might, without constitutional amendment, and by a mere change in the classification of offences, or a more detailed gradation of punishments, be put outside the constitutional requirement. Every statutory enlargement of the classes of acts punishable under complaint or information would tend in the direction of the reform now suggested.

One important and far-reaching result of the abolition of the grand jury, or the narrowing of its range of action, would be the power of amendment. Under the grand jury system an indictment is in theory, although not in fact, the statement of the grand jury, and therefore no amendment in it can be made except by the grand jury; and as the grand jury is ordinarily dismissed as soon as it has reported its indictments, a defect discovered after that time is fatal. In England, by statute, indictments may be amended; but England has no constitutional limitations. There would seem to be no constitutional difficulty in providing that where prosecution originates by complaint, the complainant may be permitted to amend it.

2. In such prosecutions as may now be begun by information or complaint, provision should be made by statute for amendment.

3. A defendant should be permitted to waive trial by jury. Theoretically, trial by jury is the bulwark of innocence; but practically, in certain classes of cases, and in individual cases of all classes, it is the defendant's greatest peril. It is a matter of common remark among prosecuting officers that a conviction of crime can be got in certain classes of cases upon evidence on which a verdict could not be got in a civil case. Indeed, there are offences in which hardly more than an accusation is necessary to a conviction. If the present requirement of trial by jury rested upon the ground that judges are likely to be too lenient, waiver of jury trial should not be allowed; but since, as all the books put it, a trial

by jury is a privilege of defendants, a defendant ought to be allowed to waive it.

4. The question of the place of trial ought to be more systematically regulated. It is now, in many cases, a matter of accident. If a person steals an article in Boston and travels with it to Springfield, he is indictable in any county and in every county through which he has passed, since in each county there has been, in the eye of the law, a taking and a larceny. So, by statute, in England and in some of our States, a person who commits a crime in a public conveyance may be prosecuted in any county through which the transit takes place. So, in any offence, one commits a crime, in the eye of the law, in any locality where he acts, either personally or by an innocent agent. From this it follows that one often commits his offence in more places than one. He who utters forged paper by mail is guilty of uttering at the place where he deposits the paper in the mail, and also at the place where it is delivered by the post-office. In libel by newspaper publication, the offender commits the crime, and is punishable, in the locality where the newspaper is published, and also in every other county or district into which, by his direction, or as a natural result of the publication, a copy goes. In the crime of conspiracy, all the conspirators are indictable and punishable in any and every county or district where any one of them commits an act in pursuance of the conspiracy. The matter of venue, or locality of trial, is recognized in the constitutions of the United States and of the States as a matter of vital importance, and, within limits, a matter of right. If it is a matter of importance, and, in any sense, a matter of right, it ought to be fixed upon some principle, and with a view either to the best ascertainment of the truth, or of practical convenience to the public and the accused. It cannot be fixed by arbitrary rules. It should be fixed, in each case, after complaint or indictment, by the court, upon motion of either party. It ought to be settled with reference, first, to the question of a fair trial, second, with reference to the matter of expense and of convenience. In a vast majority of cases the question of venue would settle itself; but there are many cases in which unnecessary expense is made, and a less fair trial had, by reason of an artificial statutory determination of the venue.

5. Criminal pleading should be simplified, and pleadings in different offences should be put upon one common footing. At present there is no uniform rule. In some offences, as in the

crime of obtaining goods by false pretences, and in some forms of embezzlement, as well as in many new statutory offences, the requirements of pleading are extremely severe, and often seriously embarrass prosecutions, and put the government to great and needless expense. In other offences, on the contrary, particularly in some of the older and more familiar crimes, the requirements of pleading are extremely loose. There should be one rule upon the subject, applicable to all offences, old and new. If it is proper in embezzlement, in obtaining goods by false pretences, and in modern statutory crimes in general, to require that the complaint or indictment shall set forth all the essential facts creating the offence, a similar rule ought to be applied in larceny, and the pleading of conclusions of law ought to cease. If, on the other hand, pleading of conclusions of law are unobjectionable, they ought to be allowed in all crimes.

The wide diversity in pleading between the older and some of the newer crimes is well illustrated by the difference of requirements in larceny, embezzlement, and false pretences. In each of these offences the wrong consists in despoiling another of his goods. The difference between these crimes is this: that in larceny one wrongfully acquires the possession of goods, — no more, no less; in embezzlement he violates a possession lawfully acquired; in false pretences he gets both possession and title. If I to-day have a gold watch, and to-morrow it has gone from me, never to return, wrongfully and without an equivalent, it is immaterial to me whether the wrongdoer gets it by acquiring possession of it unlawfully, or by lawfully violating a possession which he lawfully had, or by unlawfully getting from me both possession and title together. Indeed, these crimes run so close together that it is often a matter of great subtlety within which of them a given act falls. It would seem to follow that there should be a common requirement of pleading in respect of these offences. In embezzlement, however (except where relaxing statutes have been passed), and in false pretences, it is necessary to set forth the transaction, — in embezzlement, the contract of bailment under which possession was got, and the fact of violation of it by the defendant; in false pretences, the contract of purchase, exchange, or the like, and the getting of title and possession under it by the defendant, — in order that the court may be able to say, from a consideration of the facts, whether or not the grand jurors or the complainant or informant properly interpreted the act; while in

larceny it is competent to the prosecutor simply to allege that the defendant "stole, took, and carried away" the goods in question, — that is, to state a conclusion of law as to whether certain facts in law constitute larceny. It may be said in answer to this that there are certain wrongful acts which are essentially of a composite nature, and others which are elemental in character; that embezzlement and the obtaining of goods by false pretences are of the former class, and larceny of the latter. This is undoubtedly sound, in the sense that larceny is a more common and familiar offence than embezzlement and false pretences, and that a prosecuting officer can more safely be trusted to draw a conclusion of law as to larceny than as to embezzlement and false pretences; but it is not true that larceny is elemental in the sense that any sensible person, or even any well-informed lawyer, can, with certainty, determine whether or not a given act does or does not constitute larceny. There are many cases of serious wrongdoing in respect of chattels, not criminal at all, which nevertheless a prosecutor might suppose to amount to larceny, and allege as such. In such a case the setting out of the facts in the manner in which they are required to be set out in embezzlement and false pretences would enable a defendant to establish his lack of criminality by demurrer, and save him and the public the burden and expense of a trial.

In the matter of simplification of pleading there are, of course, in the Federal jurisdiction and in our States constitutional limitations. The Legislature cannot abridge ancient forms or establish new ones to the extent of sanctioning the omission of essentials of the offence. In some of our States the Legislature, in attempting to simplify pleading in prosecutions of a popular character, has gone beyond the constitutional limit.¹

6. Provision should be made for the taking of testimony for the prosecution, by deposition. In the Federal practice, and probably in all the States, there now is provision for the taking of deposition by defendants. In Massachusetts, and very likely in other States, it is provided that if the defendant takes depositions, the government may do so. The Federal statutes provide in general terms for the taking of depositions in criminal cases, and the language of the Federal statutes would cover depositions in behalf of

¹ *Commonwealth v. Harrington*, 130 Mass. 35; *State v. Learned*, 47 Me. 426, 433; *McLaughlin v. State*, 45 Ind. 338; *Hewitt v. State*, 25 Texas, 722. See *Commonwealth v. Freelove*, 150 Mass. 66.

the government. But where it is provided by constitution (as it is by the constitution of the United States, and by the constitutions of many, if not all, of the States) that the accused is entitled to meet the witnesses against him face to face, it would seem clear that, without constitutional change, no provision can be made for depositions for the government, at least without bringing the defendant face to face with the witnesses at the taking of the deposition, — a thing practically out of the question where depositions are taken at a distance. It even seems doubtful whether such a statute as that of Massachusetts, providing that the defendant, by taking depositions, grants to the government the right to take them, is constitutional. It amounts to an enactment that a defendant may waive his constitutional privilege of meeting the witnesses face to face; and it is very doubtful, to say the least, whether the Legislature can authorize such a waiver, in grave offences.

The lack of the right, on the part of the government, to take depositions, constantly leads to great needless expense, and occasionally causes a failure of justice. A man obtains goods in Massachusetts by a false representation that he has an account, or otherwise has financial relations, with a banker in London; his representation may be such that no one can negative it except the foreign banker himself. If the banker is not willing to give up three or four weeks to come to Boston to testify, the government is powerless. The same thing would happen if the necessary witness were old and infirm, and unable to attend court. If swindlers, as a class, planned ahead as carefully for trial as they do for the immediate success of their frauds, they might very generally secure for themselves immunity by shaping the fraud so as to require, in proof, an impossible attendance of witnesses. Perhaps it would not be thought right, in serious offences and upon matters going to the essence of the crime, to provide for a conviction upon depositions; but there are many matters hardly more than formal, or leaving no real ground for controversy, upon which it would be safe to proceed by deposition, and it might well be left to the courts, or be fixed with some detail by statute, within what limits depositions in behalf of the government might be used.

7. One of the most serious defects in criminal procedure is the unnecessary delay that often takes place between arrest, and final judgment and sentence. Where the accused is on bail, the delay to him is, of course, not so serious as if he were in commitment;

but even then it is a disaster to a man to have an accusation hang over him indefinitely, impairing his credit in the community, and interfering with his plans; and in case of guilt the community suffers by delay, even though the accused be on bail. The practical efficiency of punishment for crime lies, not in the shutting up or extinction of the criminal class; for the criminal class merely flows through the prisons, and nine-tenths of it is constantly at large. The chief efficiency of punishment lies in the apprehension which it creates among those disposed to crime. In the case of unthinking persons, a substantial breathing-space is the next thing to acquittal. Nothing impresses such persons like swiftness of punishment. A sentence of two years, coming two weeks after the crime, would do more to prevent crime than a sentence of five years imposed after the matter is forgotten. Moreover, with most people in the community, even the best and the wisest, lapse of time induces pity; and when a crime has gone almost out of recollection, there is often a feeling of weariness and of lack of fitness in the penalty. In England, where, until lately, there was practically no court of criminal appeal, and where there is now no appeal as of right, and in practice appeals are few, punishment often follows close on crime. In our States and in the Federal jurisdiction there is often great delay. The accused, if unable to give bail, frequently has to wait for months before he can even be brought to trial. In the smaller counties of Massachusetts, for example, where terms of the Superior Court are held for criminal business only twice in the year, and last but for a few days, a person arrested shortly after the close of one term, and unable to furnish bail, has to lie in jail nearly six months before his case can be tried by a jury or come before the grand jury. If the grand jury finds "no bill," then he has been needlessly detained half a year, the public have been at expense for his support, his family have very likely suffered, and he, from mere detention in jail, has undergone a demoralization that will follow him indefinitely. To have been imprisoned for months on a charge of crime is, in the minds of most people, as time passes on, tantamount to having served a term of imprisonment under sentence. If after lying in jail six months the accused is convicted, but the conviction turns on a ruling in law, and the case goes to the Supreme Court, it is likely to be several months before it is heard there. If the decision there overturns the verdict, the accused will have been in jail perhaps a year on a charge unfounded in law. If, on the other hand, the Supreme Court sus-

tains the verdict, another term of the Superior Court may well then have passed by, and the convict may have to wait in jail four or five months more before sentence can be imposed; and this although the proper sentence may be less than the time he will have spent in jail awaiting it. For such delays there is no reason. If they are due to the county system of trials, that system ought to be abolished. There ought to be a frequent jail delivery. Appeals on questions of law to the court of last resort should be entered and heard speedily. If the docket of the court of appeal is too burdened for this, provision should be made for relief. It is a mere matter of business system and organization to keep the docket of a court open for the ready determination of appeals; and criminal cases, being a matter of public and not of mere private concern, ought not to be delayed, whatever else is delayed. Owing to the romantic charm which the term "*habeas corpus*" has with the English-speaking race, there is a tradition quite prevalent in the courts that *habeas corpus* takes precedence. Under this tradition, a judge of a high tribunal will often stop important business to hear a petition for relief from imprisonment upon civil process. The same magistrate will not be in the least disturbed by the fact that a man whose guilt or innocence turns upon a question of law may lie in jail six or eight months, or a year, to await the determination of civil disputes, many of them unimportant.

8. There are constitutional provisions throughout this country to the effect that no person shall be compelled to give evidence against himself. The writer does not believe in the wisdom of such provisions. It not infrequently happens that a person guilty, and well known to be guilty, of an atrocious crime, escapes because of the inability of the government to prove some essential fact which everybody in the community knows to be a fact. In many such cases, if the defendant were subject, not indeed to persecution or secret inquisition, but simply to examination upon the witness-stand in open court at his trial, the facts could be brought out. No innocent man is injured by having the truth known; and there seems to the writer to be no reason why guilty persons, as a class, should be protected. The constitutional provision relates to a state of oppression now long gone by.

9. The practice of arresting at the outset, in minor offences, persons accused who are not in the least degree likely to evade later arrest, is a relic of earlier times, and should be abandoned.

In England provision is made by statute for the summoning, in minor prosecutions, of defendants who are not likely to depart. Beginnings have been made, by statute, in one or more of our States in this direction, but the interests of officers in fees in-trenches strongly the present practice. In not one case in one hundred, of prosecutions upon municipal by-laws, or for any of the minor offences cognizable by inferior courts, will the accused fail to respond. There is no reason why a person, in such case, should not be brought in by summons. It daily happens that persons unnecessarily arrested are put to expense, in one form or another, in the securing of bail. In the cities, if of a humble station, they or their friends often have to pay some one to go bail. This simply means taking food and clothing from the family of the accused. In the country, the accused may have to bring his sureties twenty, thirty, or one hundred miles, and, after bail is given, may have to travel back home with them. The entire practicability of a summons system, judiciously applied, and the hostility of officials to it, are both well illustrated in Massachusetts. In Barnstable County defendants in minor prosecutions are almost invariably summoned, not arrested, and the practice works perfectly; in some other parts of the State a warrant usually issues, and the officer and bail magistrate get their fees. In different suburbs of Boston, having precisely the same class of cases and defendants, — as, for example, West Roxbury and Dorchester, — one police court issues a summons, another issues warrants and makes fees. The writer believes the present system of preliminary arrest to be one of the most serious oppressions of the present day, and as needless as it is serious.

10. In every criminal case, great or small, the public should provide witnesses for the defence as well as for the prosecution, at least where the accused is not able to bring his witnesses. The old theory was that a prosecution for crime was a contest between the injured person, or his relatives, and the accused. That theory has gradually yielded to the milder view that the contest is between the public and the accused. We ought now to be ready for the theory that a criminal prosecution is not a contest at all, but an investigation, conducted by the State, before a tribunal of its own appointment, with as great a desire to clear the defendant, if not guilty, as to convict him, if guilty. It is idle to say that "truth will out," and that if a man is innocent the

jury will find him innocent, even though witnesses in his behalf are not summoned. Any one who has tried cases in a criminal court, or in any court, knows how hollow this is. The Trefethen murder case in Massachusetts affords a striking example of this proposition. Upon one trial the defendant was convicted of murder in the first degree. Upon the second trial, with slightly different evidence, he was acquitted. Provision is made, to some extent, in different jurisdictions for the summoning of witnesses for the defence. The practice is, perhaps, universal, of summoning them in capital cases and in other classes of cases involving a grave punishment; but the principle is the same, for great cases and for small. The conviction of a working-man, and his sentence for six months or a year, are an immediate disaster to him and to his family, and entail degradation upon them. The community cannot afford to ruin a family, or to put the prison taint upon an innocent man. No question of expense should be considered in this connection. If it were necessary to choose, it would be better to abandon ornament and display in public buildings, and to give up public libraries and parks, than, for the sake of economy, to conduct a one-sided investigation into the guilt or innocence of human beings; but in fact, the cost, as compared with the whole budget of public expenditure, would be very trifling. It could not be greater than that of the cost of summoning government witnesses; and the total cost, in most of our States, for government witnesses in criminal cases is a small percentage of the whole public expenditure.

The reasoning which supports the summoning of witnesses for the defence would lead to the employment of counsel to represent defendants. Witnesses are often important to the establishment of innocence, but they are no more important, on the average, than the services of counsel. If the theory is once recognized that a prosecution for crime is not a contest between the government and the accused, but is a public investigation, there is no reason why one side of the investigation should not be represented by counsel as well as the other. The writer believes that the wisest plan would be to appoint, by law, salaried defending counsel, answering to prosecuting attorneys; to offer their services freely to all such defendants as should choose to accept them; and where the defendants choose to have counsel of their own, or refuse to accept the public counsel, to have the public counsel none the less attend upon the trial, with power to call

the attention of the court to any circumstances of fact or of law tending to innocence. There is no reason why the line should be drawn at murder cases. It should be clearly recognized that every improper conviction for crime is not only an undue harshness to the accused and those dependent upon him, but is also a serious injury to the public.

11. There should be an appeal upon the question of the extent of sentence, at least in cases of substantial punishment. In some States the sentence is fixed, at least in some cases, by the jury. Where the sentence is not fixed by the jury, it is ordinarily determined by a single judge. Naturally, there is a great inequality in sentences. If a case were presented at the same moment, upon precisely the same evidence, to five different judges, and each of them were to be required to write down his own notion of the proper sentence, the result would be surprising. In not a few cases the terms of sentence suggested by different judges would vary as much as from three to eight years. This is a matter, of course, upon which no statistics can be had, since the same precise question is almost never passed upon by two different judges; but the writer believes that most persons who have had opportunities for observation will concur with him in his present opinion. If this is so, — and the differences in human disposition, training, and prejudices make it almost impossible that it should be otherwise, — it is largely a matter of accident with a prisoner what sentence he will receive. A judge from a rural county will consider horse-stealing an enormous crime, and sentence accordingly. A judge from a city county will consider horse-stealing a mere stealing of value, and sentence accordingly. So it is with numerous other offences. Of course no tribunal can be obtained which will work with the accuracy of a machine; but if there were a right of quick appeal on the matter of sentence, there would be at least an approach to uniformity; and if, upon appeal, counsel for the government and for the defendant were to be heard, and brief reports were to be published, a code would soon form itself by which a given conviction could readily be classified scientifically, and the punishment, within narrow limits, almost certainly predicated. The result of this would be that after a short time equality would be secured without the necessity of appeal. The certainty which now obtains in most respects with regard to the rules of criminal law reduces enormously the number of appeals in law. A court of appeal on sentence would, in the same

way, mark out a course of uniformity, and simplify the whole matter.

12. The theory that a criminal prosecution is a public investigation would lead also to the conclusion that no person should be sentenced, unless to a petty punishment, without the fullest possible knowledge of all the facts. The government commonly makes some investigation into an offender's record; but provision ought to be made for a rigorous investigation, in the interest of the defendant as well as of the prosecution.

Heman W. Chaplin.

THE "DWIGHT METHOD."

IN 1891 the New York Law School was started in order to perpetuate the "Dwight method" of teaching law. Contemporaneously, the School of Law at Columbia College discarded that method as necessarily the best known among men. As professor *emeritus*, Mr. Dwight lent the lustre of his name to the older school in which, throughout thirty-three years, he had applied his method; during that period he sent to the bar over four thousand young men in whom he had at least awakened enthusiasm for their life-work, and by whom he is remembered as a teacher of the law perhaps without a rival in this country.

The present method of instruction in law at Columbia is substantially that now and for over twenty years used at the Harvard Law School; that is, the tracing of the development of legal principles by the study of selected cases. At Columbia, however, beginners are allowed to survey a given subject by the use of a text-book either before or along with the study of cases. There, too, each instructor has the singular license to apply the method he deems best. This possibly means that no one man shall hereafter in himself constitute the school, and that while the school as an institution of learning must persist in its identity, however the *personnel* of its instructors may change, still there may always be full scope for the extraordinary teacher when he appears.

In New York city there are always many young men who, from their special exigencies, must reach the bar by the shortest and easiest cut. There was a time when the local law-schools served such men best, and the change for the better was imposed upon those schools by pressure from the outside. Such students, at the same time they attend the School, usually serve in offices of practising attorneys. The Columbia School plainly announces that she does not exist for students who are under this double duty. She makes equally plain her munificence, in which deserving students may participate, and which fully atones for any benefits to be derived from such service in a law-office. If this scheme of doing double duty spoils a good student, attorneys having experience with it will agree that for the time it mars a good clerk. A business enterprise to meet the demands of such as must do this

double duty may be perfectly respectable, but it should pretend to be nothing more. A university cannot temporize, but, despite ulterior considerations, it must strive to furnish the best possible education in the law.

It is the purpose of this article briefly to exhibit what the so-called "Dwight method" is, the author of this article being of the class of 1877 of the Columbia Law School, and therefore acquainted with the method of that School. He has recently been astonished—as have others of his fellow alumni—by claims that have been published in regard to the "Dwight method." He has, for instance, just received a circular relating to this method, sent out by the new School and signed by its dean, containing, among other "tributes," the following: "The failure of a single student of thirty successive annual classes to discover, after engaging in active practice, any defect or oversight in his legal training, is a sufficient commentary on the method employed." If this claim be just, then the method referred to must be the best one; and as it is fairly of public concern that the best method of making lawyers should be widely known, it may be seasonable to illustrate that method by one experience under it, and the REVIEW may publish for that purpose an article rather aside from the usual character of its columns. This contribution is made upon the writer's own suggestion. He only is responsible for its contents; and whatever interest he may have must incline him to justify the above "tribute" to the "Dwight method," and to demonstrate that his degree won by that method is a significant decoration. For the sake of fairness, the illustration must be in some detail, as otherwise the entire method, or some excellency of it, might elude the reader.

When the writer was a student of law at Columbia—which was sixteen years ago; but it is announced that the method used there has been the same for thirty-three years—the Law School was conducted in an old building, which, though once a capacious private residence, was not at all fitted for the purposes of teaching a large body of men law by any method. Good moral character was required of candidates for admission to the School, and its diploma, *ipso facto*, admitted holders to the New York bar. This privilege the local General Term of the Supreme Court already regarded with disfavor. The course was for two years, and the entire number of students—there being two classes in the School—was about four hundred and fifty. The class to which the writer belonged numbered two hundred and thirty. Each

class was divided into a forenoon and an afternoon section. The writer during both years attended daily both the junior and senior recitations. A certain portion of each day was devoted by the students to writing from dictation a sort of commentary on the law (largely the law of New York State) prepared by Professor Dwight. This was by way of supplement to the text-books used. In the commentary, cases were cited abundantly, and the student was supposed to familiarize himself, without recitation, with the text of the commentary. The entire instruction of both classes for both years, with the exception of the instruction in Torts from Addison's treatise, was by Professor Dwight himself, and consisted of extracts from Blackstone, Parsons on Contract, Washburn's Real Estate, Greenleaf's Evidence, Potter's Willard's Equity, and the New York Code of Civil Procedure. Courses, exclusively by lecture, were given on Criminal Law, Common Law Pleading, Medical Jurisprudence, Roman Law, and Political Science, either at noon-time or in the evening, and were merely optional, only irregularly and sparsely attended, and when the last of these lectures was delivered, they were heard of no more, with the exception of the course on Political Science, in which a prize in money was awarded to the student passing the best written examination and writing the best essay of three thousand words on "The Meaning of Political Revolutions." For this prize there were usually about ten competitors. On Fridays the time which was devoted on other days to recitation was given to moot-courts, the printed case having been distributed among the students the previous week. This was an optional exercise; the attendance was meagre, and while occasionally a ready speaker came to light, on the whole the moot-courts were nugatory. The law library consisted of but a few hundred volumes in a room supplied with one long table and not over twenty chairs. The books used during the day were left on the table, where by night as many as one hundred volumes might have accumulated. There were, on the average, not more than ten students using the library at one time. The room was usually empty; but just before or after a recitation it was a popular resort. The order was not good, loud conversations — often on politics — were carried on, tobacco was freely used, and there was no place to leave hats or coats. Many of the students never used the library. Those serving in offices hurried to the School just as recitations began, and left the instant they were finished. It may here be interpolated that in the new School,

where the "Dwight method" is still applied, there were, last year, five hundred and eight students and a very well furnished library of fourteen thousand volumes. A liberal average of these five hundred and eight students using the library at any time would be twenty-five, and these *habitués*, the same persons from day to day; and their use of the books depended on the prior right to them of possibly twelve hundred persons (the tenants of the Equitable Building and the members of the Lawyers' Club). Thus one may estimate what is the necessary relation between the "Dwight method" and a law library.

In the Law School of Columbia of the writer's time there were one or two voluntary law clubs, each with a large nominal membership. The proceedings were conducted jovially, and the spirit of repartee prevailed. The clubs promised amusement rather than profit.

Attendance at recitations seemed to be voluntary, but it was always prompt, and the room was filled to the utmost. The questions were based directly on the text-book, in which a stint had previously been assigned for preparation. The foot-notes in the book were rarely commented on, and by most of the students were never read. The recitation never lagged; it was always brisk, as by far the greater part of the talking was by Professor Dwight. He cited cases constantly, often by mere volume and page; but when the case was of great significance, he stated and analyzed it luminously, as it was his singular gift to do. During the two years' course the cases he cited must have covered a number of thousands of pages. The reading of a case by the students was never exacted, and a question was never predicated upon the fact that a case had been read. Cases were known and remembered by reason of the teacher's comments on them. This was the extent to which students were "encouraged" to read cases. No recitation lasted longer than ninety minutes, and of these recitations there were four a week, in which about one hundred and fifty men were to be questioned. These men always recited in strict alphabetical order, so that each man had his chance to be heard about once a week. The questions were put quickly and with wonderful tact, which was sometimes outshone by the tactful use of a surprising answer. If the reply was not responsive, or was otherwise bad, it was nobody's loss. It would have been responsive to another question, or true under other circumstances. That other question and those other circumstances were instantly brought to light and profitably dwelt

upon by the teacher. No student ever had his "faculties tried in the highest degree," or was ever driven to a standstill. Every student was "encouraged." Occasionally a student of ability or earlier training did discriminate or analyze: this was regarded with general favor. The teacher continually dropped practical suggestions well worth remembering. He had the knack of putting legal propositions so that they would stick in a fairly receptive mind. He never failed to recommend habits of hard work. He often declared that every successful lawyer must expect crises when the act of a moment must be the result of long periods of systematic preparation. He declared that the law was not all theory, science, or history, but was in parts one, in parts the other; and he touched upon it in one or more of these phases only as the moment required. The final examinations for a degree were oral, and throughout specifically like the recitations.

In these details we have the "Dwight method." It is obvious how very large a part of it was Professor Dwight himself. It is conceivable he might succeed where many another might fail with any given method. He was a marked character, sufficiently so to justify some direct personal comment on him. He was a man of robust health, of considerably more than ordinary stature, erect, and well built. His head was made venerable by a plentiful growth of hair almost white. His eye needed no glass, was bright, and his ruddy face lighted up easily with a smile, altogether giving an impression of benignity and abiding youthfulness. He habitually wore an easy fitting suit of broadcloth, and shoes that were an immutable solace, not to him only, but to the students who clustered at his feet, and who believed this foot-gear was an object-lesson in equity, — averse to hardships, and always following the law. His voice was quite high-pitched, but carried remarkably well, was of pleasant quality, and seemed never to show fatigue after long use. He was at the School, either in his private office or in the class-room, early and late. He always seemed to have an immediate purpose. He was never idle. At the School he was always found working at the law. He knew the latest decisions. He watched for decisions that were to be expected. His power of concentration must have been great, yet he was always accessible and obliging. He would at the request of any student put aside the matter in which he was for the time absorbed. All students treated him as the oracle to be consulted, as the one who could and would make the law plain. Many seemed to act on the belief that

their advancement depended chiefly on personal contact with this man, whom they therefore sought out and questioned on any pretext and at any time. The writer never heard of his dealing a rebuff, or of his temper being ruffled, but has witnessed admirable displays of his patient endurance of triflers. With all this kindness and accessibility, there was no lack of dignity. Every student respected this man. He had the knack in conversation of monopolizing all mental activity, or of letting his interlocutor do exactly such thinking as he deemed that interlocutor capable of. In the class-room this power was most deftly used. He knew his men, not by name merely, but by calibre, and put just such strain on each student's faculties as he deemed might be safely borne. He could so cross-question a dunce that the dunce would come off amazed at his own unconscious cerebration. He had a greater variety of students to deal with than is ordinarily found in any school, not only as regards previous education, but as regards social status. His heart warmed — but not too obviously — towards the earnest, capable student; but he indulged in no favoritism. He expressed himself in a single cordial manner towards all. The letters with which he sent men from his School seemed to show a lack of discrimination; but a second reading would disclose that in reality he did discriminate, however that fact might be veiled by his kindly intent to lend the bearer of the letter a helping hand. He was patriotic, an out-spoken and active party man. Most of his students were voters, and very many of them not of his political faith. He would enter freely into a conversation on politics, and out of school hours preside at or address political meetings. Once in class he even recommended the students to vote for a certain nominee for a judgeship. All this was in so happy a manner that he gave no offence and incurred no criticism. That the students believed him to be a practical man added to his sway. They knew that as a judge in the highest court of New York he had elaborated important opinions; they knew he had been successful at the bar, and that between his hours of teaching, practising attorneys sought his counsel. Many an office student asked his opinion on some legal problem pending in the office where he served, and the opinion was always given freely. In utterance he was ready, but his speech was peculiarly clear and homely. Such embellishments as he allowed himself were by striking illustrations from history or the current affairs of the day, or by an occasional witty story. These were never meretricious. He knew by long use of most of them

that they were positive aids to his purpose, which was always serious. He was a man of broad, liberal spirit, urging his men that their chosen profession and the elevation of the law should have their first interest, but that every lawyer should have some other, outside, useful or public-spirited interest. He resented at once, and effectually, any inquiries designed to assist the pettifogger. No teacher was ever less of a pedagogue, no scholar ever less of a bookworm. His influence he must have gladly known, but he was modest as to that, and generally. This influence was never anything but wholesome. If, as rarely happened, his duties for the hour were assigned to another, for that hour the School was nearly deserted. Day after day and all day, in a room ill suited to the purpose and crowded beyond its seating capacity,—surrounded by students sitting on the floor and to his very feet,—Professor Dwight applied his method (doing himself four-fifths of the talking, call it recitation or what you will) with unflagging buoyancy. He made everything so plain as he went, and he went so quickly, that the student might delude himself with the belief that our whole jurisprudence was innate in himself, and only awaited the awakening touch of the great teacher. He aroused and he riveted the attention of all to a degree that was very great, and wholly exceptional in a school-room. Strangest of all, his own interest in the work appeared to be as fresh and exuberant as that of any of his listeners.

Any method of teaching must have been a mere accessory to such a personality as that of Professor Dwight, nor can there be surprise that the great body of students sent forth by this remarkable teacher stand as his partisans. In the writer's day a large number of the students at the School had had little or no experience with any method of education, but there were also many graduates—some men of the first rank—from our leading colleges. For the untrained, perhaps no other than the "Dwight method" would have answered, and it did answer so well that these men appeared on a common level of excellence with the men of previous training and high rank. The consensus of those college-bred men at that time was that Professor Dwight was the School, and the method of instruction ephemeral.

It must seem—and the writer's experience and observation of its workings bear this out—that the method traced above imposes no stress on the student beyond the necessity of putting himself into a quite receptive state: of listening and of remembering.

This is in degree and kind wholly unlike the demands upon the resources of a practising lawyer from the beginning to the end of his career. The law, for the student, is not merely something to know of, but also something to do; and the method that inures the student to such mental processes as are to be his very tools of trade when he starts upon his independent career is the method that will best fit him for any responsibility he may assume for his first or for his last client. Here, then, may be the defect of the "Dwight method." The writer and many others could not have been duly considered among the "students of thirty successful annual classes" when it is declared that no such student has been able "to discover . . . any defect or oversight in his legal training."

It is said that "no other system of instruction has succeeded in making sound lawyers, nor probably ever will." It would be most profitable to know how this absolute conclusion could be arrived at safely. It is sound, not merely successful, lawyers that a disinterested institution of learning must devise a method to create. It might well be asked whether the honorable members of our highest Federal bench have had the advantages of this one perfect method; for if not, then the other and uglier horn of the dilemma would stick out.

Since the birth of the New York Law School the merits of each method have been somewhat ventilated by pamphlets, from which it may be seen how the claims of the new School as to the "Dwight method" reflect the account given above. If it were not for the claim that the "Dwight method" is the one exclusively sound, the reader of the pamphlets *pro* and *con* might fairly conclude that both methods might coexist: the "case method" for those who have capacity, or want soon to acquire capacity, to know and apply law; the "Dwight method" for those who have no such present capacity, but hope to attain it at least by the time they are admitted to practice. The former method would be pursued by students ready to "try their faculties in the highest degree" by "a system in which principles are studied in their application to facts;" "to develop the power of legal analysis and synthesis," under the guidance of a teacher, by the examination and comparison of selected cases, thus gaining "a knowledge of what the law actually is." The latter method would exist for such as "*may* read cases to illustrate principles;" for students whose "interest must be aroused," who are "*encouraged*, . . . after some acquaintance with general

legal rules, to read and carefully study leading cases," who want while in the School "to obtain an outline of legal principles," leaving it as "the business of their later lives to fill up this outline . . . partly by the exercise of their reasoning powers, . . . and partly by the examination of adjudged cases;" for students who, when they become lawyers, will devote a great part of their lives to the study of cases, and, it is said, "*they will then have the capacity for such study.*" The italics are the writer's. It is obvious that each method serves a particular grade of student, and it seems clear which method the higher grade will select.

The New York Law School declares that "a teacher's office is to teach." The significance of this language varies as Professor Dwight or some other may be the instructor, or as a kindergarten or a law-school is the scene of instruction. In the former, it must be nearly all teaching by the teacher; in the latter, it should be nearly all learning by the student, under the guide of the teacher. Every student in a law-school should be in earnest, either from the instinct of self-preservation, or from ambition to test his "capacity" for his chosen life-work. As a body, such students should have survived all led or "dumb-driven" cattle. That method which is so akin to the method of actual practice of the law that it may demonstrate to the student at the outset his want of capacity may already prove a blessing to him. While it may prove wise, and, for the time being, pleasant, "to arouse his interest" and to "*encourage* him," the chances are against ultimately making a sound lawyer by this method.

The pamphlet of the new School, dated April, 1893, contains two illustrations which display a grave misconception of this matter. So far as they illustrate, they show the necessity of the case method. "The wisest man," says the dean of the School, "as well as the simplest school-boy, when he begins the study of Greek, is apt to begin with the alphabet, and not with trying to read *Æschylus*." What is the alphabet of the law, if not cases that have developed principles? Would it not be strange if some gifted teacher, by exhibiting "the outline" of "*Prometheus*" and dilating on its transcendent excellencies, should so "arouse the interest" of some wise man or simple school-boy seeking to learn Greek as to *encourage* him to make it the business of his later life to study the alphabet of that language, to live by teaching it himself?

The pamphleteer, in illustration, says, "If a young man wishes

to learn English history, is he sent to Europe to ransack the archives and study the original documents, or are the works of Green and Gardiner and Macaulay put into his hands?" The answer is, that if this young man wants to be an historian in the sense that every law student presumably wants to be a lawyer, it is notoriously the method of every institution of learning of high character to prescribe that he shall deal only with the archives and original documents. But if the young man wants the mere literature of history, he may read "approved text-books" on that subject. Ever since men have had affairs, however simple, to adjust, there have been laws, however clumsy, to adjust them by, and these laws have been applied by those who have made a special study of them. If immemorial usage has shown any method to be always present in the study and application of law in its rude or in its highly developed state, it is the case method.

The exercises upon the graduation of the law class to which the writer belonged consisted of addresses by Professor Dwight and Charles O'Connor. The former said he could not forecast the future of a single member of the class, as he had too often seen his most promising pupils, on going into active practice, stricken as by a complete paralysis, from which they never recovered. Charles O'Connor—a sound lawyer, but by what method we shall not ask—affirmed that a law-school had given its *élèves* a poor equipment if it sent them forth full of learning, but without any skill in applying it.

Facts are shy. Even if the controlling principle of a case may be casually announced, the facts do not gravitate to it. No matter how thoroughly one may be versed in legal principle, he must have the capacity to select from the complicated details that always encumber a transaction the relevant master facts that bind his case to recognized rules of law, and to justify his selection against all opposition. To do this well is the chief excellence of the sound lawyer. It is done by the "case method." Those educators who in sincerity and by deliberate choice apply this method as a means of instruction may themselves feel encouraged by the fact that the exponents of "the only system" which "has succeeded in making sound lawyers" have announced that they were (in 1891) preparing a selection of cases to be read by students in connection with text-books.

Thomas Fenton Taylor.

IMPLIED WARRANTIES IN SALES.

A BRIEF examination of the development of the implied warranties which the courts have recognized, or shown an inclination to recognize, as growing out of sales of chattels, may tend to make more clear the law as it is now settled in that respect, and furnish also an interesting example of the development of rules of law.

As Professor Ames has already pointed out in this REVIEW in his article on the History of Assumpsit,¹ the original remedy for breach of warranty of chattels was in an action on the case, the essential allegation being "*warrantizando vendidit*." The importance of making this allegation in such form that the warranty shall appear to have been a part of the sale, and not subsequent to it, is made apparent in *Mew v. Russell*,² which was an action on the case on a warranty, the allegation being that whereas the plaintiff bought of the defendant so many hogsheads of wine at such a price, the defendant, "*in consideratione inde warrantizabat et affirmabat adtunc et ibidem ea esse bona*," etc. It was urged that this showed but a voluntary promise made afterwards and (as stated in the report of the case in Skinner) on an executed consideration. But the court thought this objection "too nice," and that "*adtunc et ibidem*" showed it to be "all at an instant." In a case relied upon in argument it had been held in an action on the case for deceit in the sale of a mare that "*warrantizavit et vendidit*" was not good for the reason suggested.³

From *Stuart v. Wilkins*,⁴ decided in 1778, and *Williamson v. Allison*,⁵ decided in 1802, it appears that the introduction of action in assumpsit, instead of on the case, for breach of express warranty, was then recent, the advantage of the new form being that the money counts might be added (for instance, a count for money had and received, the consideration having failed). But in the latter of these cases Lawrence, J., declares the old form of action in tort to have been still in general use during his time at the bar.

¹ 2 Harv. Law Rev. 1, at page 8.

² 2 Show. 284; S. C. (*s. n.* *Moor v. Russell*) Skin. 104.

³ *Pope v. Lewyns*, Cro. Jac. 630. See also *Lysney v. Selby*, 2 Ld. Ray. 1118.

⁴ 1 Doug. 18.

⁵ 2 East, 446.

The general remedy available to vendee against vendor for falsehood, fraud, or misrepresentation was by action on the case in the nature of deceit. But to support this action it was necessary to allege and prove that the vendor knowingly misrepresented the facts, or falsely promised that which he knew would not prove true. The allegation in such cases was, not only that the defendant "*falso et deceptivo*" made the representation or promise, but that it was made "*sciens*," etc. In other branches of the law there might be remedy for injury from mere falsehood, or concealment, or abuse of confidence; but to recover in tort for deceit, the older cases, in general, allowed no evasion of the requirement that the representation complained of must have been known by defendant to be false. A few cases cited in the note¹ will show how persistently the courts drove the vendee who complained of being cheated to alleging and proving a warranty, whereby the vendor took upon himself the risk as to the truth of the representation complained of, or the alternative of showing a false representation, made with the knowledge of its falsity. The modern refinement of holding the vendor responsible for stating as true within his own knowledge that which he does not know to be true,² finds no recognition in the older cases. The responsibility is upon the buyer; if he does not choose to insist upon a warranty, he must rely upon his own knowledge and judgment.³ This is the doctrine of *caveat emptor*.⁴

Notwithstanding the definiteness with which the doctrine of *caveat emptor* has thus been repeatedly announced and applied, constant efforts have been made, with varying degrees of success, to establish exceptions to it in particular classes of cases, by securing the recognition of implied warranties. Perhaps the earliest of

¹ *Chandelor v. Lopus*, Cro. Jac. 4; *Sprigwell v. Allen*, Aleyn, 91; *Paget v. Wilkinson*, as noted in 2 East, 448; *Stuart v. Wilkins*, 1 Doug. 18; *Early v. Garrett*, 9 B. & C. 928 (*per* Littledale, J., 932); *Seixas v. Woods*, 2 Caines, 48; *Perry v. Aaron*, 1 Johns. 129; *Stone v. Denny*, 4 Met. 151; *Hammatt v. Emerson*, 27 Maine, 308; *Jackson v. Wetherill*, 7 S. & R. 480; *McFarland v. Newman*, 9 Watts, 55.

² *Litchfield v. Hutchinson*, 117 Mass. 195.

³ As Fitzherbert puts it (after mentioning the action upon the case for breach of warranty for sale of corrupt wine, or of a lame or diseased horse), "But note: it behooveth that he warrant it to be good, or the horse to be sound, otherwise the action will not lie. For if he sell the wine or horse without such warranty, it is at the other's peril, and his eyes and his taste ought to be his judges in that case." Nat. Brev. 94 c.

⁴ Lord Coke states the doctrine thus: "Note that by the civil law every man is bound to warrant the thing that he selleth or conveyeth, although there be no warranty; but the common law holdeth him not, unless there be a warranty either in deed or in law, for *caveat emptor*." Co. Litt. 102, a.

these attempts was in regard to the doctrine of implied warranty of title.

In an action of deceit brought in the time of Elizabeth, in which it was claimed that the defendant had sold as his own the goods of another, it was held by Periam and Wyndham that the action did not lie because it was not alleged that the defendant, "*sciens* that they were the goods of a stranger," etc. "But if it had been so alleged, the action did lie, for it may be the defendant did know no otherwise but that they were his own goods; but if he had affirmed that they were his own goods, then the action would lie." Anderson, *contra*: "For it shall be intended, that he that sold had knowledge whether they were his own goods or not." It was adjudged against the plaintiff.¹ Here Anderson insisted on an implied warranty of title pure and simple; whether the other two judges would have held an express affirmation of title to be a warranty or a ground of action for deceit notwithstanding the absence of a *scienter*, seems not to be clear. During the reign of James I. a similar question arose in an action on the case in the nature of deceit based on an allegation by the defendant in the sale of tithes that he was the lawful incumbent of the vicarage and entitled thereto, and it was charged that, knowing himself not to have such right, he "*falso et deceptivo*" etc. The defendant, in arrest, claimed that to sell that to which he had no title was not ground of action, there being no warranty. Tanfield, C. B., distinguished a case in the Year Books² where it was held that one having tortious possession and knowingly selling as his own was liable. But here there was no possession, and the decision was for the defendant.³ During the same reign it was alleged in an action on the case that the defendant "*falso et deceptivo*" sold to the plaintiff sheep, affirming they were his own when they were another's. It was moved in arrest because it did not appear that the defendant had committed any offence in affirming they were his own. "*Sed non allocatur*, for the sale of goods which were not his own, but affirming them to be his goods, knowing them to be a stranger's, is the cause of action," and it was adjudged for the plaintiff.⁴ Here there seems to be uncertainty. The statement does not show that knowledge was alleged, and the defendant urges the objection; but the ruling of the court is against him on the ground that he had knowledge. In 1689, in an action

¹ Dale's Case, Cro. Eliz. 44, C. B.

² 42 Ass., pl. 8.

³ Roswel v. Vaughan, Cro. Jac. 196, Exch.

⁴ Furnis v. Leicester, Cro. Jac. 474, B. R.

on the case, it was alleged that the defendant sold oxen in his possession, affirming that they were his, when they were not. It was held that *scienter* was not necessary, and that action would lie upon the bare affirmation, the plaintiff having no means of knowledge as to the ownership but by the possession.¹ But in another report of the same case² it is said the objection might have been good on demurrer, but after verdict the declaration was well enough. In *Medina v. Stoughton*,³ where recovery in case was sought against the defendant for selling a lottery ticket, which he had in his possession, as his own when it was not, Lord Holt says that "When one having the possession of property sells it, the bare affirming it to be his amounts to a warranty, and an action lies on the affirmation, and perhaps no other title can be made out; *aliter* where the seller is out of possession, for there may be room to question the seller's title, and *caveat emptor* in such case to have either an express warranty or a good title." The latter part of this statement is not found in the report of the case in Lord Raymond, and the whole of it is *dictum*, for the case went off on a question of pleading.

Blackstone in his Commentaries⁴ states the law broadly as corresponding to the civil law in allowing recovery against one who sells as his own, if the title proves deficient, without any express warranty, and for this cites only *Furnis v. Leicester*⁵ and Rolle's Abridgment; yet this statement, practically unsupported, seems to be the basis of the line of decisions in this country on the subject. *Boyd v. Bopst*⁶ (1785), in which, as reported, no cases are cited, and *Defreeze v. Trumper*⁷ (in 1806), citing Blackstone only, are the earliest cases, and lay down the rule without qualification, to the effect that the sale alone implies a warranty of title. Kent follows Lord Holt's *dictum* as to the effect of the seller's possession, and later cases in the United States are mostly in accord with him.⁸

But in England no such result was reached from the cases. In *Ormrod v. Huth*⁹ (1845), it was suggested that in cases in which there had been a recovery for defective title, it would be found that

¹ *Crosse v. Gardner*, Carth. 90; s. c. 1 Show. 68, B. R.

² Mod. 261, s. n. *Cross v. Garnet*.

⁴ 2 Bl. Com. 451; see also 3 Id. 165.

⁵ 1 Salk. 210; s. c. 1 Ld. Raym. 593.

⁶ Cro. Jac. 474, *supra*.

⁷ 2 Dall. 91, in Superior Court of Pennsylvania, at *nisi prius*.

⁸ 1 Johns. 274.

⁹ *Scranton v. Clark*, 39 N. Y. 220; *Charnley v. Dulles*, 8 W. & S. 353, 361; *Coolidge v. Brigham*, 1 Met. 547, 551; *Shattuck v. Green*, 104 Mass. 42, 45.

¹⁰ 14 M. & W. 651, Exch. Ch.

there was either an assertion of title embodied in the contract, or a representation of title which was false to the knowledge of the seller. And in *Morley v. Attenborough*¹ (1849), the Court of Exchequer went over the whole ground in an action against a pawnbroker for selling a harp to which his title was, without his knowledge, defective because the harp did not belong to the pledgor, and held that unless there was an express warranty of title or something in the transaction indicating an affirmation equivalent to an express warranty, there could be no recovery for defect of title not known to the seller. This view of the law has received the approbation of at least one court in the United States.² But the suggestion in *Morley v. Attenborough* that sale of goods in a shop might in itself be held to imply a warranty of title, has been followed in a later case,³ where the judges agree that the offering for sale is, under ordinary circumstances, a warranty of title.

The introduction of implied warranties of quality can be sufficiently discussed in a few words, although the law on the subject is much more extensive. In some early cases it was said that a seller of corrupt victuals was liable in case for the deceit,⁴ regardless of his knowledge; but afterwards it was decided that this peculiar liability was imposed only on common dealers in victuals, and, even as to them, resulted not from the common law, but from an ancient statute.⁵ In the United States, Blackstone's broad statement that "In contracts for provisions it is always implied that they are wholesome,"⁶ was early followed in New York;⁷ but in that State the doctrine was by subsequent cases strictly limited to a presumption of warranty arising from sale of provisions by a dealer for consumption, and not from sale of provisions as mere merchandise;⁸ and the same result has been reached in other States.⁹

¹ 3 Exch. 499.

² *Howland v. Doyle*, 5 R. I. 33; but the same court modifies its position in *Burgess v. Wilkinson*, 13 R. I. 646.

³ *Eichholz v. Bannister*, 17 C. B. N. S. 708.

⁴ Y. B., 9 H. 6, 53; Keil. 91; Fitzh. Nat. Brev. 94 c.

⁵ *Burnby v. Bollett*, 16 M. & W. 644. This view is countenanced by language used by the court in *Roswel v. Vaughan*, Cro. Jac. 196, where it is said that for the sale of corrupt victuals action lies without warranty, because it is against the commonwealth.

⁶ 3 Bl. Com. 165.

⁷ *Van Bracklyn v. Fonda*, 12 Johns. 468; to same effect, *Hoover v. Peters*, 18 Mich. 51.

⁸ *Wright v. Hart*, 18 Wend. 449; *Moses v. Mead*, 1 Denio, 378.

⁹ *Emerson v. Brigham*, 10 Mass. 197; *Howard v. Emerson*, 110 Mass. 320; *Giroux v. Stedman*, 145 Mass. 439; *Humphreys v. Comline*, 8 Blackf. 516; *Ryder v. Neitge*, 21 Minn. 70.

As to quality in general, all the justices and barons but one in Exchequer Chamber in the famous case of *Chandelor v. Lopus*,¹ which was an action on the case for selling a stone representing it to be a bezoar stone, when it was not, set their faces against any liability on a representation not knowingly false, and not made a warranty. Indeed, they seem to have gone farther, and reversed the judgment of King's Bench, which had held the defendant liable for knowingly misrepresenting the stone in this respect;² but from a statement of the same case in another place,³ it appears that the reversal in Exchequer Chamber was because knowledge of the falsity of the representation was not pleaded. This statement of the case, made in argument fifteen years after the decision, is perhaps as reliable as that in Croke's report, first published more than fifty years after the case was decided. It was not, however, until the early part of this century that cases of any decisive value on the implied warranty of quality are found. In *Stuart v. Wilkins*,⁴ Lord Mansfield had intimated that a sound price did not imply a warranty of soundness, and that knowledge or express warranty must be proved to establish liability in *assumpsit*; and this opinion was followed in *Parkinson v. Lee*,⁵ which was an action in *assumpsit* to recover for the sale to the plaintiff of damaged hops, the defect not being known to either party. The court refused to recognize an implied warranty that the goods were merchantable. But where the article was manufactured or supplied for a particular purpose, as saddles for a particular trade,⁶ copper sheathing for a ship, bought from one regularly dealing in such supplies,⁷ or rope adjusted to certain tackle for a definite use,⁸ it was held that the seller was liable for the defect without any proof of knowledge on his part. And where goods were sold under a particular description, as that of "waste silk,"⁹ or "scarlet cuttings,"¹⁰ or a "copper-fastened vessel,"¹¹ it was held that the buyer was entitled to damages if they were not

¹ Cro. Jac. 4 (1603).

² The opinion of Popham, C. J., in King's Bench is stated in a note to 1 Dyer, 75, a.

³ 2 Rolle's R. 5.

⁴ 1 Doug. 18 (1778).

⁵ 2 East, 314 (1802).

⁶ Laing v. Fidgeon, 6 Taunt. 108 (1815).

⁷ Jones v. Bright, 5 Bing. 533 (1829). A similar case in King's Bench was *Gray v. Cox*, 4 B. & C. 108 (1825).

⁸ Brown v. Edington, 2 M. & G. 279 (1841).

⁹ Gardner v. Gray, 4 Camp. 144 (1815).

¹⁰ Bridge v. Wain, 1 Stark. 504 (1816).

¹¹ Shepherd v. Kain, 5 B. & Ald. 240 (1821).

such as the description called for. And in a late case Brett, J., speaking for the Court of Appeals, after referring to cases in which it was held that in a sale of "Calcutta linseed,"¹ or of "rape oil,"² the thing sold must not only correspond with the sample, but answer the description, says the fundamental rule is that the article shall answer the description contained in the contract as to being salable, merchantable, fit for the purpose specified, etc., and that in such cases it is immaterial that the defect was not discoverable by the seller.³

To treat these various express or implied representations as matters of description in the contract and non-compliance of the article with such description as a breach of contract, is not, however, a complete solution of the difficulty. There is a material difference between breach of an executory contract of sale and breach of warranty.⁴ In the one case, acceptance by the buyer of the goods offered in performance of the contract terminates the seller's obligation,⁵ while in the other, the seller's liability continues as an obligation to pay damages; but the buyer is not entitled to return the property and recover the purchase-money.⁶

It seems, therefore, that it was in the action on the case for deceit, and not in the action for breach of warranty, that persistent effort was made to introduce the doctrine of an implied obligation,⁷ both as to title and as to quality; that these efforts were partially successful, although constantly resisted on the ground that *scienter* was a necessary element of the action for deceit, and that after it became customary, for practical reasons, to bring the action for breach of warranty in *assumpsit*, the doctrine of implied promise, which had been so instrumental in extending the scope of *assumpsit*, furnished an escape from all difficulty, and enabled the buyer to rely upon statements or circumstances which, while not showing an express warranty, are recognized as imposing an obligation on the part of the seller.

Another step in the course of development must be noticed.

¹ *Wieler v. Schilizzi*, 17 C. B. 619 (1856).

² *Nichol v. Godts*, 10 Ex. 191 (1854).

³ *Randall v. Newson*, 2 Q. B. D. 102 (1877).

⁴ Lord Abinger, in *Chanter v. Hopkins*, 4 M. & W. 399.

⁵ *Coplay Iron Co. v. Pope*, 108 N. Y. 232; and see *Merriman v. Chapman*, 32 Conn. 146.

⁶ *Street v. Blay*, 2 B. & Ad. 456; *Heilbutt v. Hickson*, L. R. 7 C. P. 438, 450.

⁷ A "warranty in law," as is said in 1 Roll. Abr., title: Action Sur Case, pl. 1 & 2. And see *Burgess v. Wilkinson*, 13 R. I. 646.

As Professor Ames suggests in the article already referred to,¹ the allegation of warranty implied, originally, a very definite undertaking, quite distinct from a mere representation. Lord Holt is said to have introduced the doctrine that no special form of words is necessary to constitute a warranty;² but the cases referred to as those in which such a proposition was announced³ were actions on the case for deceit, and turned on the question as to whether *scienter* was necessary. Lord Holt used no language indicating that he was expressing an opinion as to what would constitute an express warranty. Nevertheless, a great expansion of the scope of express warranty has taken place, and now almost any representation tending to induce the purchase, and which is not about a mere matter of opinion,⁴ or a matter about which the buyer is, or in the exercise of reasonable diligence ought to be, as well informed as the seller, and which cannot, therefore, be supposed to have been relied upon,⁵ will constitute a warranty.⁶

The result of this course of development has been to leave the doctrine of *caveat emptor* theoretically unchanged, the tendency to recognize higher requirements of honesty and fair dealing on the part of the seller, which threatened its overthrow, having satisfied itself with the extension of express warranty and the invention of various implied warranties which are no longer considered exceptions to *caveat emptor*, but rather as differing from express warranties only in that the obligation which they recognize arises from acts of the seller instead of from words.

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¹ 2 Harv. L. Rev. 1, 10.

² *Per* Buller, J., in *Pasley v. Freeman*, 3 Term R. 51, 57 (1789).

³ *Crosse v. Gardner*, Carth. 90, and *Medina v. Stoughton*, 1 Ld. Raym. 593.

⁴ *Towell v. Gatewood*, 2 Scam. 22; *Reed v. Hastings*, 61 Ill. 266.

⁵ *Margetson v. Wright*, 7 Bing. 603; s. c. 8 Bing. 454; *Schuyler v. Russ*, 2 Caines, 202; *Winsor v. Lombard*, 18 Pick. 57; *McCormick v. Kelly*, 28 Minn. 135; *Humphreys v. Comline*, 8 Blackf. 516; *Barnard v. Kellogg*, 10 Wall. 383. But the warranty may be such as to relieve the buyer from any duty to exercise his judgment, or may be such as to impose upon the seller liability for the uncertain consequences of a defect. *Tye v. Finmore*, 3 Camp. 462; *Holliday v. Morgan*, 1 E. & E. 1; *Pinney v. Andrus*, 41 Vt. 631; *First Nat. Bank v. Grindstaff*, 45 Ind. 58; *Meickley v. Parsons*, 66 Iowa, 63.

⁶ *Chapman v. Murch*, 19 Johns. 290; *Henshaw v. Robins*, 9 Met. 83; *Kinley v. Fitzpatrick*, 5 How. (Miss.) 59; *Hanson v. Busse*, 45 Ill. 496; *Hawkins v. Pemberton*, 51 N. Y. 198; *White v. Miller*, 71 N. Y. 118; *Gould v. Stein*, 149 Mass. 570.

PERILS OF THE SEAS.

A STUDY IN MARINE INSURANCE.

NICHOLAS MAGENS, an English merchant, writing, in 1755, the earliest book in our tongue on the subject of insurance, sets out at length¹ a policy of marine insurance dated at London, Aug. 30, 1744. So much of it as is of present interest runs as follows:—

“Touching the Adventures and Perils which we the Assurers are contented to bear, and take upon us, in this Voyage, they are of the Seas, Men of War, Fire, Enemies, Pirates, Rovers, Thieves, Jettizons, Letters of Mart and Countermart,² Surprisals, Takings at Sea, Arrests, Restraints, and Detainments, of all Kings, Princes, and People, of what Nation, Condition, or Quality soever, Barratry of the Master and Mariners, and of all other Perils, Losses, and Misfortunes that have or shall come, to the Hurt, Detriment, or Damage of the said Ship, &c., or any Part thereof: And in case of any Loss or Misfortune, it shall be lawful to the Assurers, their Factors, Servants, and Assigns, to sue, labour, and travail for, in, and about the Defence, Safeguard, and Recovery of the said Ship, &c., or any Part thereof, without Prejudice to this Insurance.”

Probably the foregoing formula is coeval with the beginnings of our modern commerce, and it is used to-day in New York and London. Although universally condemned by the judges for its looseness,³ it has been the subject of so much judicial interpretation, not to say legislation, that it will undoubtedly continue in use for many years to come. Out of the mass of precedents to be found in the books certain well-defined rules have emerged. Those that are pertinent to my essay are these:—

I. Risks assumed by the assurer are (*a*) those expressly enumerated; (*b*) those of a character similar to what are enumerated. (This rule states the interpretation that is given to the general

¹ 1 Magens on Ins. 552 (1755).

² A somewhat hasty examination of the dictionaries fails to disclose this word “countermart,” although it is found in nearly every policy of insurance on vessels that has been written in English for more than three hundred years. The phrase more usually used is, “letters of marque and reprisal.”

³ For a list of such animadversions, see 2 Pars. on Shipping, 27 (1859).

words "and of all other Perils, Losses, and Misfortunes that have or shall come, to the Hurt, Detriment, or Damage of the said Ship, &c., or any Part thereof."¹)

II. Risks not assumed are: (a) Negligence of the assured personally, of his master, or of his mariners.² (It is to be noted, however, that loss from barratry — that is, wilful wrong or *criminal* negligence of the master or mariners — is expressly assumed.) (b) Ordinary wear and tear.

Among the risks enumerated in the policy are: "Perils of the Seas," — a phrase of which the attempted definitions have been very numerous. It is one of those phrases which are intended to describe a collection of facts of no very exact or determined character, and, therefore, a strict definition is extremely difficult to come at, if not, indeed, impossible. Before such a definition can be attempted with any degree of success, the constitutive elements of the idea must first be ascertained and stated. When they are accurately known, then it will be time to frame a definition; before that, the attempt to define partakes of the nature of a leap in the dark.

In the case at hand, at least three such underlying ideas are to be noted. There may be others; but it is not my intention now to make an exhaustive list of them.

The first of these seems to be that of *accident*, — a *casus fortuitus*.³ A peril of the seas is something distinct from the natural and ordinary operation of the forces of the sea or of the air. Thus, the ordinary deterioration of a vessel by wear and tear is not intended by the phrase. Neither would it be a peril of the sea if a vessel were allowed to rot in disuse.

Magnus v. Buttemer is a leading case. The ship "Elizabeth" was moored at high tide, and at that time she floated. At low tide she grounded on a hard and steep shingle, and in consequence was severely strained. It was held that that was not a peril of the seas, Maule, J., saying: "Here nothing has happened which the assured could have wished or anticipated to happen otherwise than it did happen. They intended the ship to take the ground as she did. There was no accident."⁴

¹ 2 Arn. on Ins. 789 (6th ed., London, 1887), and cases cited.

² General Mut. Ins. Co. v. Sherwood, 14 How. 351 (1852); *Dixon v. Sadler*, 5 M. & W. 405 (1839); s. c. on appeal, 8 M. & W. 894 (1841).

³ 1 Pars. on Mar. Ins. 544 (Boston, 1868), and cases cited.

⁴ *Magnus v. Buttemer*, 11 C. B. 876 (1852), Maule, J., at p. 882.

Another of the constitutive elements is, that the accident must be such as pertains to a ship as a ship. It is not every accident on board a vessel which will render the insurer liable. Lord Bramwell brings out this point very clearly in his opinion in the *Thames, &c. Insurance Co. v. Hamilton*.¹ In that case a donkey-engine upon a vessel suffered serious damage because, while it was in operation, one of the valves became clogged, and the air-chamber was split in consequence. This was an accident *on* the ship, not *of* the ship, and therefore it was unanimously held to be not a peril of the seas.

The third and last element of the definition which I shall discuss seems to be that the damage must be a physical damage, and come from natural forces, if it is to be held within the terms of the policy.

Mr. Arnould,² in his valuable work on Insurance, says:—

“The words ‘perils of the seas’ only extend to cover losses really caused by sea damage, or of the violence of the elements, *ex marine tempestatis discrimine*. . . . Thus, damage sustained by a ship from the fire of another vessel of the same nation, mistaking her for an enemy, is not, it seems, recoverable as caused by a peril of the sea;³ and the damage sustained by a merchantman from the fire of an enemy would, it is apprehended, be open to the same objection if so stated;⁴ though both . . . are included under the general words,⁵ and would be recoverable under a correct specification of the cause of loss.”

There may be other qualifications necessary before an entirely accurate definition of our phrase can be effected; but these three are sufficient for my purpose. We might now hazard a definition of perils of the sea as *marine accidents*. It is doubtful, however, if we have even yet really advanced towards our goal, for in any given case we must revert to the essential conditions, as just stated, before we can decide whether it is included in the definition.

In considering cases on this subject, it must be borne in mind that at the end of the clause in the policy with which we are dealing are very general words, “and of all other perils, losses, and misfortunes which have or shall come to the hurt, detriment, or

¹ *Thames, &c. Ins. Co. v. Hamilton*, L. R. 12 App. Cas. 484, 495 (1887).

² 2 Arn. on Ins. (6th ed., London, 1887), 754.

³ Citing *Cullen v. Butler*, 5 M. & Sel. 461 (1816).

⁴ Citing *Taylor v. Curtis*, 6 Taunt. 608 (1816).

⁵ “All other Perils,” &c.

damage of the said ship," &c., and many recoveries are due to these words rather than to the description, "perils of the sea."¹ As this distinction is not always clearly made, care must be taken not to overlook it.

There are certain general classes of accidents which are always held to be perils of the sea. They are the three following: (1) Collision; (2) Foundering; (3) Stranding, shipwreck, or grounding. They include by far the largest number of losses, but the questions presented by them are not so difficult as those which arise in other cases. In a very large proportion of marine accidents there is an element of negligence, — negligence either of the master or of the crew of the vessel. It is this element of negligence which has raised the most puzzling points of interpretation, and it is with this same element of negligence, in its relation to what are called perils of the seas, that I propose to deal in this essay. All that has preceded is merely a preliminary clearing of the ground for the purposes of the following discussion.

As we have seen, by the terms of the policy the underwriter assumes to indemnify the owner against all perils of the seas. He does not assume, according to the books, to indemnify against negligence, unless it be negligence of the crew or captain amounting to barratry.² If, then, an accident occurs which comes within the description of a peril of the seas, but which is due to negligence not amounting to barratry, shall the underwriter be held responsible, or shall he be absolved? Let us assume an illustrative case.

A steamer carries a spare propeller weighing four or five tons. It is obvious that such a mass of steel must be very securely fastened, if great, or even fatal, injury to the vessel is to be avoided. Let it be supposed that the fastenings are negligently made, with the result that in a heavy storm which strikes the steamer the propeller comes loose, and, being tossed about, causes severe damage.

The injury to the vessel conforms to the requirements which have been found to be explicitly contained in the policy; that is, it was an accident pertaining to the ship as such, and caused by the physical forces of the sea. It was ultimately due, however, to the negligence of the master in stowing the propeller. On whom shall fall the loss, — on the owner, who must bear the consequences of

¹ 2 Arn. on Ins. (6th ed., London, 1887), 754, 789, and cases cited; 1 Pars. on Ins. (Boston, 1868), 547, and cases cited in n. 4.

² See *ante*, p. 222.

his agent's carelessness, or upon the underwriter, who has taken upon himself responsibility for all perils of the seas?

In this dilemma the courts have evolved two rules to assist them. Mr. Arnould states one of them as follows: "Where the loss is not proximately caused by the perils of the sea, but is directly referable to the negligence or misconduct of the master or other agents of the assured, not amounting to barratry, there seems little doubt that the underwriters would be thereby discharged."¹ And Mr. Justice Curtis, in a very acute opinion in the case of the General Mutual Insurance Co. v. Sherwood,² after quoting the foregoing passage from Arnould, states the other rule thus: "A loss caused by a peril of the sea is to be borne by the underwriter, though the master did not use due care to avoid the peril." Mr. Justice Curtis then goes on to say: "The two rules are in themselves consistent. Indeed, they are both but applications to different cases of the maxim, *Causa proxima non remota spectatur*. In applying this maxim, in looking for the proximate cause of the loss, if it is found to be a peril of the sea, we inquire no further. We do not look for the cause of that peril; but if a peril of the sea which operated in a given case was not of itself sufficient to occasion, and did not in and by itself occasion, the loss claimed, if it depended upon the cause of the peril whether the loss claimed would follow, and, therefore, a particular cause of the peril is essential to be shown by the assured, then we must look beyond the peril to its cause to ascertain the efficient cause of the loss." This was the case to which these remarks applied:—

The brig "Emily" collided with another vessel, and the collision was due to the undisputed negligence of the first mate. Both vessels suffered considerable damage, and it was adjudged, after suit in admiralty, that the "Emily" was responsible for the damage to the other vessel. Her owner, having paid the amount fixed by the decree, brought suit against the insurance company to recover both losses, that is to say, the loss caused to the "Emily" herself, and the loss caused by her owner's having to pay for the damage to the other boat. The learned justice decided that the underwriter was liable for the damage to the brig herself, for the reason that it was caused by the collision, admittedly a peril of the sea; and it was immaterial, therefore, that the collision was due to the negligence of the first mate. He decided further that the underwriter was not

¹ 2 Arn. on Ins. (1st ed., London, 1849), 771.

² 14 How. 351 (1852).

responsible for the damages paid to the other boat, because that damage was not caused by the collision. The collision alone would not have been sufficient to render the "Emily" liable. It was for the reason that the collision was a negligent collision, and for that reason alone, that the "Emily" was liable at all; and, therefore, the cause of that loss was, not the collision, but the negligence. Mr. Justice Curtis's opinion in this case contains by far the best discussion of the two rules with which I have met in my reading.

The Latin maxim used by the learned justice seems to have been first used in this connection by Lord Ellenborough in the case of *Livie v. Jansen*¹ in 1810. Certainly prior to that time the text-books do not contain it. In 1806, however, *Chambre, J.*, speaks of the "inevitable cause" in substantially the sense of *proxima* in the maxim, and Bayley, Serjeant, in the same case, *arguendo*, says: "The loss ought to be assigned to the immediate cause."² From these quotations and from the fact that it was not until the present century had opened that the question began to be common in the courts, we may infer that the solution of the problem which the maxim affords was applied nearly simultaneously with the rise of the problem itself.

The difficulty with these two rules, or rather with the one rule, is twofold. In the first place, it is assumed that the *cause* of the loss is a peril of the seas. The fact is, however, that a peril of the seas, as that phrase is used in the policy and defined in the cases, is not a *cause* at all; it is always a *result*. That was established when it was determined that a peril of the seas must be an accident.³

A cause is a force, an energy. It is dynamic. Winds, waves, rain, lightning, steam, gravity, men's muscles, are all forces, and accidents are the resultants of their interaction. In the illustrative case, for example, the accident was the breaking of the timbers, the partitions, the decks, or whatever was injured. The causes were the steam driving the vessel through the water, the waves buffeting her, the hurricane rushing upon her, and finally the muscles of the men at the wheel which directed her course. These were all co-working, efficient causes, and out of their conjunction came the accident.

It is perfectly evident that when the insurer underwrites the

¹ 12 East, 648 (1810).

² *Hodgson v. Malcolm*, 2 Bos. & P. N. R. 336 (1806).

³ See *ante*, p. 222.

policy, it is accidents, injuries, damages, that he has in mind. It is these, not causes, that he promises to make good, and it is these that he would naturally enumerate in drafting his contract. He might describe his risks, it is true, by making a list of possible causes of injury, and then undertake indemnity against their effects. That would, however, be quite too philosophical for the merchant of the Middle Ages, and he, be it remembered, devised our policy.

To a very large extent this reasoning is tacitly involved in the reported decisions. The three recognized and principal perils are, as before stated, collision, stranding, and foundering. These are results, not causes; accidents, not forces. When the courts say, as they do, in pursuance of the second rule, as stated by Mr. Justice Curtis, that the insurer is responsible for collisions, even though the cause of them be negligence, it is in effect saying that that class of accidents has been uniformly accepted as one of the perils of the seas, and that in all such cases an inquiry into cause is unnecessary. The reason is that the insurer assumed the responsibility of that kind of accident, irrespective of cause. Indeed, every decision holding that, when a peril is expressly assumed, it is immaterial in determining the question of liability that it is caused by negligence, is a decision to the point that the underwriter insures effects, not causes.

The practical interpretation of insurance adjusters is confirmatory of this view, and they are courts who decide innumerable more cases than does any judicial tribunal. Such men do not look for the proximate cause in disputed cases, and it is extremely doubtful whether the mercantile mind would ever lend itself to such a refinement of reasoning as that. The fact is, the contract of insurance is a mercantile contract, and the general principles of its interpretation among merchants and insurance men were settled long before the courts were ever called upon to decide such questions. When, therefore, the courts use rules in interpreting the policy which merchants have not adopted, that is some evidence that the courts have gone astray.

Passing by, however, the first objection, that a peril of the seas is not a cause, there arises another objection still,—an objection that is logical in its nature. The owner of a vessel comes before the court and claims indemnity against an insurance company for an accident which he says was a peril of the seas. The court says to him in reply, "You must show what was the proximate cause of

your loss. If the proximate cause was a peril of the seas, then your claim is just. If the proximate cause was the negligence of your master, then your cause is unjust." The court has obviously not relieved itself of the necessity of defining perils of the seas. The logical syllogism may be baldly stated thus: The plaintiff may recover indemnity for perils of the seas. If the proximate cause of his loss was a peril of the seas, he has suffered a peril of the seas. If the proximate cause was negligence, he has not. This, in the process of deciding, is *analogous* to the fault of using in the proof of a proposition the proposition itself. When the decision is reached and announced, however, the error has evolved into a complete and veritable *petitio principii*.

It is not to be supposed for a moment that any court has openly allowed itself to fall into the logical error here pointed out. The error is implicit, however, in all decisions in which the maxim forms a link in the chain of reasoning, though it is very completely concealed. To show that the arguments of the courts are not misrepresented, I have chosen for illustration of the error the best-reasoned case that I know, the facts and decision of which have already been stated.

In the *General Mutual Insurance Company v. Sherwood*,¹ Mr. Justice Curtis thus states the question submitted to him: "The question is whether, under a policy insuring against the usual perils, including barratry, the underwriters are liable to repay to the insured, damages paid by him to the owners of another vessel and cargo, suffered in a collision occasioned by the negligence of the master or mariners of the vessel insured." There were in that case only three clauses of the policy within which the plaintiff could bring himself, as will be readily seen by the extract from the policy given in the opening paragraph of this article. These are: (1) Perils of the seas; (2) Barratry of the master or mariners; (3) The final clause as to all other perils and losses.

Take these in inverse order. The third clause introduces no considerations different in kind from the other two. As has already been shown, it is limited in its scope to losses similar in character to those already provided for by the preceding words of more special import. As to the second, barratry, there was no proof that it was the cause of the collision. If such had in fact been the case, the underwriters would have been responsible, since

¹ 14 How. 351, 362 (1852).

they expressly assumed the risk of barratry. It follows, then, that the plaintiff was to entitle himself to a recovery, if at all, on the ground that he had suffered a peril of the seas, or something of that nature, and the question was whether that particular loss, *i. e.* the necessity of paying damages to the other boat, was a peril of the sea, or something of that nature.

The learned justice, having stated the question, then says: "Upon principle, the true inquiries are, what was the loss, and what was the cause?"¹ The course of his inquiry was to ascertain whether a peril of the sea (in this case, a collision) was the cause, or whether the cause was the mariners' negligence; for in the one case, he said, the underwriter, and in the other case the shipowner, was liable. It was the necessity of that inquiry that led him to state and distinguish the two rules. When it was finished, the learned judge was no farther advanced than when he began. He had determined, it is true, that the cause of the loss was negligence; but he had not determined that the result of the negligence was not a peril of the seas, *except by assuming that such results never are perils of the seas*. Since that was the very issue, the assumption was of course unwarranted.

In truth, the whole inquiry into cause should be abandoned. It has involved the courts in a maze of mediæval subtleties utterly foreign to the contract with which they are dealing, to say nothing of the internal inconsistency with themselves, and the external irreconcilability with each other, which has resulted therefrom. I defy any one to produce an intelligible rule by which to harmonize the adjudged cases on this subject. The probable truth of the matter is that at the outset the underwriters undertook to indemnify the shipowners for certain kinds of loss, no matter what the cause was. More than that, it was in all probability their conscious purpose to relieve owners of the burden of that special cause of loss, the occasional carelessness of masters and mariners. Such men are beyond control, and their carelessness in many things is inevitable. The shipowners, unable to escape its results, went to the insurers for indemnity, and the latter intended to grant it. Indeed, why should the insurers make themselves liable for the *criminal* wrong-doing of the men, as they have by the clause as to barratry, if they did not mean to be answerable as well for lesser injuries?

The judges, in holding otherwise, have almost certainly varied

¹ 14 How. 351, at p. 363.

widely from the intention of the parties. Various explanations of the fact, historical and other, might be assigned, but space forbids. Suffice it to say, in conclusion, that if the courts desire to adjust their decisions to mercantile conceptions, they will, I am convinced, make use of some such process as has been indicated earlier in this article. They will first accurately determine the constituent ideas contained in the words "perils of the seas," and then, if it seems well, embody them in a definition; but in all doubtful cases it is to these constituent ideas, rather than to the definition, that they will ultimately resort. That is a method which may well be used in subjects other than the limited one here discussed.

Everett V. Abbot.

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THE LAW SCHOOL. — In the November number of the REVIEW a prediction was ventured that the total falling off in the attendance at the School this year would approximate 50, and a hope expressed that almost the whole of this diminution would prove to have taken place in the ranks of the special students. Fuller figures more than justify the forecast then made. The total loss is 43; the falling off in the class of special students is 48. There are 5 more men in the first-year class than in 1892-93. The second and third year classes added together give exactly the same total this year as last. The total registration this autumn as compared with that of the four preceding years is given below: —

	1889-90	1890-91	1891-92	1892-93	1893-94
Third year	50	44	48	69	66
Second year	59	73	112	119	122
First year	86	101	142	135	140
Specials	59	61	61	71	23
Total	254	279	363	394	351

Readers of the REVIEW may remember that there appeared in the December number of last year a table showing the make-up of four successive first-year classes, both geographically and as regards the holding of college degrees. It is thought advisable to publish a similar compilation this year, to serve as a record, not only of the growth of the School, but of the direction of its extension. The table follows: —

HARVARD GRADUATES.

Class of	From Massachusetts.	New England outside of Massachusetts.	Outside of New England.	Total.
1893	34	1	19	54
1894	30	2	17	49
1895	32	4	13	49
1896	23	7	17	47

GRADUATES OF OTHER COLLEGES.

Class of	From Massachusetts.	New England outside of Massachusetts.	Outside of New England.	Total.
1893	5	9	21	35
1894	7	20	38	65
1895	8	14	30	52
1896	14	11	45	70

HOLDING NO DEGREE.

Class of	From Mas- sachusetts.	New England outside of Massachusetts.	Outside of New England.	Total.	Total of Class.
1893	4	1	7	12	101
1894	20	1	10	31	142
1895	16	3	14	34	135
1896	10	4	9	23	140

The most noticeable thing about this table is the largely increased plurality of graduates from other colleges over graduates from Harvard. This is certainly matter for congratulation. As was pointed out last year, when the same tendency was observable, though in a far less degree, these figures plainly indicate that the School is enlarging its field. A further analysis by colleges makes the broadening of the influence of the School still more apparent. Yale sends 10 men this year, as against 7 last year, and 18 the year before. Amherst comes next, with 9 men. Six men come from Brown, 5 from Leland Stanford, and 3 each from Williams, Princeton, the University of Michigan, and Georgetown. Dartmouth, Bowdoin, Bates, Wesleyan, Boston, Alleghany, Iowa State University, and the University of Oregon each contribute 2 men. Over twenty other colleges send a man apiece.

AN unfortunate error in regard to the requirements for admission to the School seems to have gained general currency in the West. For example, the Michigan Law Journal for October asserts that "the announcement is made that Harvard College, commencing with the year 1895-96, will raise the qualification for admission to its Law School, so that none but students upon whom have been conferred the degree of A. B. or its equivalent, by first-class colleges, can enter the School." If the editors of the Michigan Law Journal and of the other periodicals which have repeated and enforced this statement had taken the trouble to glance at any of the circulars of the Law School, or at either the May or the October number of the REVIEW, they would have found this alleged "announcement" absolutely false, in general and in particular. The object of the rules to which this blundering reference is made has been stated so often that repetition seems mere tediousness. Those who think, with the Michigan Law Journal, that the "Harvard idea seems to be to exclude all but a privileged class from admission to the practice of the law," have only themselves to blame for their unfortunate misapprehension. Any man who passes a satisfactory examination in simple Latin and French and in Blackstone's Commentaries can enter the School, now as heretofore. All such students will be given the regular degree, after three years' residence and the passing of the requisite legal examinations, if they attain a mark within five per cent of that required for the honor degree; *i. e.*, if they attain what is often technically spoken of as "creditable standing." The Michigan Law Journal is of opinion that "Harvard's intentions are commendable enough, but

its method is too heroic. The tendency of its new rule is to bar from the study of the law, under the direction of experienced instructors, men of capacity and ability, and men who have not been so fortunate as to have enjoyed the luxury of that special collegiate education which entitles the student to the degree of A. B." Now, the "men of capacity and ability" referred to are precisely those who attain creditable standing in the School, and therefore become entitled to the degree. The rule excludes only men who have *neither* a liberal education, *nor* capacity and ability to attain "creditable standing." It does *not* "work injustice to those young men of brains and ambition whose circumstances have denied them a collegiate education and an A. B. degree, and who are infinitely better equipped mentally to enter upon the study of the law than a large percentage of the sons of aristocracy and wealth who have managed with mediocre ability and the aid of a tutor to squeeze themselves into the possession of an A. B. degree." The Chicago Legal News also is mistaken in its premises when it remarks that "Harvard may never have knocking at its classic doors the future Marshall, Webster, or Lincoln, because this mental giant has not in his pocket the A. B. degree." There is still room in Cambridge for all "mental giants," whether they come from the school or the plough. No "announcement" has been made that they are shut out, or that they will be shut out, either in 1895-96 or thereafter.

These misrepresentations of the position of the School are none the less hurtful because they are careless rather than intentional. It is hoped that the respectable periodicals which have given them color will be as prompt to correct as they were to spread them.

At the meeting of the American Bar Association this summer, two papers were read which should especially interest readers of the REVIEW. They are indorsements of the Harvard method of instruction by men from widely separated localities. The first of these is the address of Professor Austin Abbott, "Questions on Legal Education." In emphasizing the importance of a scientific study of procedure in schools, he refers to the work done along these lines by Professor Langdell, Professor Thayer, and Professor Ames. While premising that "there is no one best way of teaching law, any more than there is one best way of trying a case," he still seems to think that at least there is no better way than by the use of cases. But his description of his own manner of teaching makes it clear that the case system is an elastic one. Probably in no two schools is precisely the same method followed. Professor Abbott regards as one of the chief merits of the system the colloquy which is so marked a feature of the work at Harvard. The second address referred to is that of Emlin McClain, Professor of Law at the University of Iowa. Professor McClain, whose "Cases on Carriers" is used here, is an outspoken advocate of the case-system. However, he would confine it to the more elementary subjects; his point being that where information rather than discipline in legal thinking is the object sought, the use of cases is too slow and laborious. This is a suggestion certainly worthy of consideration.

THE Harvard Law School Association's prize for 1892 was taken by Oliver Reginald Mitchell, a graduate of last year, writing on "The Fictions of the Law: have they proved useful or detrimental to its Growth?" The essay will be published in an early number of the REVIEW.

"LOST" GRANTS. — Thanks to the foresight of our courts in adopting Rolle's view (2 R. Abr. 269. See *Coolidge v. Learned*, 8 Pick. 504; *Melvin v. Whiting*, 10 Pick. 295; *Reimer v. Stuber*, 20 Pa. 458; *Tracy v. Atherton*, 36 Vt. 503, annotated in the second edition), that cases of prescription should be decided by the analogy to the Statutes of Limitation, we in this country are interested only historically in the immediate question as to when one may and when one may not presume a lost grant; but the rise and wane of the doctrine upon that subject in England are interesting and practical in their bearing on the constant changes of substantive law under the guise of changes of presumption. At the time of the Prescription Act, 2 & 3 Wm. IV., if enjoyment of an easement for a long term of years was not a legal bar to its denial, at least the jury were entitled to make it one. Starting from a stretching of the old mode of proving a lost deed by parol evidence, the mushroom fiction grew until put a stop to by that statute. But the statute failed to do two things: it did not include easements of support, and it did not, in terms, abolish the fiction. The result of the first was *Angus v. Dalton*; the result of the second was that careful lawyers continued to claim under a lost grant as well as under the Prescription Act (see Hall, Profits, 105; Gale, Easements, edn. 1876, p. [98]; *Aynsley v. Glover*, L. R. 10 Ch. 283), until another *casus omissus* has come up in *Wheaton v. Maple & Co.* [1893], 3 Ch. Div. 48. The plaintiff claimed an easement of light by prescription of forty-one years' open enjoyment against the defendants, who were tenants for years of the Crown on a ninety-nine year lease, falling in in 1914. As the Court of Appeal (Lindley, Lopes, A. L. Smith, L.J.J.) held that the section on light in the Prescription Act did not bind the Crown nor the Crown's tenants, because the reversion could not be bound, the plaintiffs were thrown upon the fiction of a lost grant. The court make short work both of the fiction and of the plaintiffs' case. Lindley — who in *Angus v. Dalton* said that "the owner of a building which has in fact been supported for twenty years has, *prima facie*, at all events, a right of action . . . against the owner of the adjoining land if he . . . take away the support. This proposition is open to doubt only on the ground that it is not wide enough. . . . It appears to me contrary to the reason for the theory itself to allow . . . an enjoyment to be disturbed simply because it can be proved that no grant was ever in fact made. If any lawful origin . . . can be suggested, the presumption ought to be made" — and Lopes, who in *Angus v. Dalton* simply concurred with Lindley, both now turn their backs upon the fiction. Lindley says, "A grant from the Crown . . . cannot be presumed, for there has been no enjoyment as against the Crown itself, and without it there is no foundation for such a presumption. . . . There is no legal presumption as distinguished from an inference, in fact, in favor of . . . a grant" from the lessees of the Crown. Lopes talks more emphatically. "To presume a lost grant made by the Crown or the lessees of the Crown since 1852, would be overtaxing the credulity of the most credulous, and would be making a demand too extravagant even for the elasticity of this patient and accommodating fiction." If the judges of the Court of Appeal go on consistently, another case will strip the presumption of every vestige of fiction, and leave it where it was two hundred years ago. The fiction was a passable one as fictions go; but it is no longer needed, and is dismissed with a bad character.

IS ELECTRICITY WITHIN THE PRINCIPLE OF *FLETCHER v. RYLANDS*?—The principle now well known as that of *Fletcher v. Rylands* has lately been considered in England with reference to electricity, in the case of the *National Telephone Co. v. Baker*, 1893, 2 Ch. 186. The National Telephone Co. brought an action to restrain the defendant from using his electric tramway in such a manner as to interfere with the working of the plaintiff's telephone lines. It appears that the defendant in the operation of his tramway employed the single-trolley system, which requires the use of the earth as a return conductor. The plaintiff company, which also relied upon the earth for completing its circuit, complained that some of the electricity discharged by the defendant into the earth flowed into its "ground wires," and interfered with the operation of its lines so seriously as to render them practically useless.

The court (Kekewich, J.) gave judgment for the defendant. The express ground for the decision was that the defendant was authorized by a statutory provision to use electric power, and that the Legislature must be taken to have condoned in advance any mischief which might arise from a reasonable use of that power. But the greater part of the opinion is devoted to the consideration of the question whether, apart from statutory authority, the plaintiff company would not be entitled to obtain an injunction on the ground that the principle of *Fletcher v. Rylands* is applicable, and the court arrives at the conclusion that it would be entitled to an injunction. Kekewich, J., says: "I cannot see my way to hold that a man who has created, or, if that be inaccurate, called into special existence, an electric current for his own purposes, and who discharges it into the earth beyond his control, is not as responsible for damage which that current does to his neighbor as he would have been if, instead, he had discharged a stream of water. The electric current may be more erratic than water, and it may be more difficult to calculate or control its direction or force; but when once it is established that the particular current is the creation of, or owes its special existence to, the defendant, and is discharged by him, I hold that if it finds its way on to a neighbor's land, and there damages the neighbor, the latter has a cause of action." It will be observed that Kekewich, J., regarded the circumstances of this case as analogous in every respect to *Fletcher v. Rylands*, and thought it should be governed by the same principles which governed that case. The only significant difference between the two cases is that the Telephone Company was making an extraordinary, and not a natural, use of land. But that is not really an important difference; for it could scarcely be urged that if a dam on A's land gave way, and by the rush of water a reservoir on B's land were destroyed, A would not, on the theory of *Fletcher v. Rylands*, be liable to B for destruction of the dam. The remarks of Kekewich, J., which have been quoted are of course *obiter*; but nevertheless they indicate what the decision would have been if the attendant had been unable to avail himself of the defence of statutory authority. They are, moreover, especially notable as showing, for almost the first time since *Fletcher v. Rylands* was decided, a disposition on the part of an English court to apply the principle of that decision squarely, and without attempting to draw a distinction, as was done in the cases of *Nichols v. Marsland*, 2 Exch. D. 1, *Box v. Jubb*, 4 Exch. D. 76, and *Madras Co. v. Zemindar*, L. R. 1 Ind. App. 364.

In this country there have been a number of cases between telephone

companies and electric railway companies arising out of circumstances similar to those in the principal case. But in none of the cases does it seem to have been recognized that the principle of *Fletcher v. Rylands* was applicable. The leading American case perhaps is *Cumberland Telephone Co. v. United Ry. Co.*, 42 Fed. Rep. (Tenn.) 273. There *Fletcher v. Rylands* was very cursorily examined, and dismissed as not being in point. The court (Mr. Justice Brown) does not even seem to have taken the pains to ascertain what the decision in *Fletcher v. Rylands* really was. Now, however, that the analogy has been pointed out, it can hardly fail to receive attention in future litigation concerning damage caused by the lawful use of electricity. Since such cases are bound to arise with constantly increasing frequency, they may be the means of bringing the principle of *Fletcher v. Rylands* before the courts in many States where, strangely enough, the question has not yet been settled.

RESTRAINT OF TRADE. — The case of *Gamewell Fire Alarm Tel. Co. v. Crane et al.* (Massachusetts, not yet reported) shows the present position of the Massachusetts Supreme Court upon the question of contracts in restraint of trade. The defendant Crane agreed "not to engage in the business of manufacturing or selling fire-alarm or police-telegraph machines and apparatus, and not to enter into competition with the said Gamewell Co. either directly or indirectly, for the period of ten years next ensuing from the date of this agreement;" and this stipulation was held void, as in restraint of trade and contrary to public policy. Field, C. J., who writes the opinion, says: "So far as we are aware, in every modern case in this Commonwealth, except one [that one he distinguishes], where a contract in restraint of trade has been held valid, the restriction has been limited as to space. . . . The plaintiff did not buy the good-will of a . . . business; . . . it is an article of prime necessity for . . . large cities and towns; . . . the stipulation will tend to give the plaintiff a monopoly," and "may impair his [defendant's] means of earning a living. . . . The stipulation seems to us to be something more than is reasonably necessary to protect the plaintiff, . . . even if that should be the test, upon which we express no opinion." These are indications of six different tests of public policy, and the court are wary of pinning their faith upon any one. They conclude by saying that "if there is to be a change in the law, . . . we think that it is for the Legislature to make it." This case is a fair example of the Massachusetts view and of the present bad state of the law upon the subject. It must be worse restraint of trade to force a merchant to guard against all large contracts and against all negative personal agreements, in ignorance whether contracts about such things as police signals will be held bad because they affect "necessities" or because they "tend to monopoly," than it is to let a full-grown man agree not to deal in such "necessities." If we are to have this rule, we ought to have it stated so clearly that business engagements can be made with confidence. But why need we have this rule? As Mr. Eaton points out (4 HARVARD LAW REVIEW, 128 ff.), there is good authority and good reason for holding that the ultimate test is reasonableness. And if this is so, the doctrine of restraint of trade takes an unimportant place in the law, for elsewhere also equity will not enforce specific performance of an unreasonable agreement, and at law damages can be made to cover only so much of the

breach of contract as infringes on the other party's reasonable protection. The Massachusetts court are not necessarily so bound by prior decisions as they would indicate, for the question is clearly not one of law, but one of fact for the court, and the decision of it may properly be controlled by the change of the conditions of trade which has recently come about. In the light of present history, this is no longer an effective weapon against monopoly; taking trade as it is carried on to-day, such an agreement is not an unwarrantable restriction. Greater concentration and greater restraint are matters of every-day occurrence. If the condition of things is bad, it should be attacked to some purpose.

It is scarcely necessary to call attention in this connection to Mr. S. C. T. Dodd's article in the last number of the REVIEW. The authorities are collected and discussed in an article (cited *supra*) by Amasa M. Eaton, in 4 HARVARD LAW REVIEW, 128.

RECENT CASES.

AGENCY—INJURY TO SERVANT.—Plaintiff was one of a gang of workmen who together with a foreman were employed by defendants to unload a ship. While doing so, plaintiff was injured by the breaking of the necessary apparatus, caused by negligence in its construction. *Held*, that the rule that a master is bound to furnish safe appliances, and cannot escape liability for failure to do so by intrusting the duty to a servant by whose negligence a fellow-servant is injured, does not apply where several persons are employed to do certain work, and by the contract of employment, express or implied, they are to adjust the appliances by which the work is to be done. *Burns v. Sennett*, 33 Pac. Rep. 916 (Col.).

There is a difference of opinion upon the subject of the liability of the master under such circumstances. This case follows the English doctrine, which is also law in Massachusetts. *Killea v. Faxon*, 125 Mass. 485. In *Wilson v. Merry*, 1 L. R. H. L. Sc. 326, the Lord Chancellor says: "The master is not and cannot be liable to his servant, unless there be negligence on the part of the master in that which he, the master, has contracted or undertaken with his servant to do." In every case the question whether an agent is employed as servant or as "independent contractor" is a question of intention, and therefore a question of fact. Where the agent is one who is recognized by the law as exercising a distinct calling, involving for its exercise a certain degree of skill or experience, there is a strong presumption that the employer did not reserve any control over one who presumably knows much better than himself how to do the work, and therefore such a person will not be the servant of the party employing him. Clerk and Lindsell on Torts, 46. In this country the doctrine established by the United States Supreme Court and by most of the courts of last resort in the different States is that the master is liable for the negligent performance of duties which rest by relation upon the master, whether the master perform such duties personally or through an agent or servant. *Hough v. Railway Co.*, 100 U. S. 213. In *Davis v. Central Vermont Ry. Co.*, 55 Vt. 84, the master was held liable for the negligence of his servant in the discharge of a duty which the master owed to a general workman.

BILLS AND NOTES—LIABILITY OF PARTIES WHOSE NAMES ARE NOT ON THE INSTRUMENT.—An action was brought on a note signed "T., Agt.," and it was alleged that T., "as agent for the defendant J., under and by direction . . . of J., and in the due management . . . of her business," made the note. *Held*, upon demurrer, that no cause of action was stated: (1) the general agency alleged did not give T. authority to bind J. by a promissory note; (2) the defendant's name was not upon the face of the instrument. *Bank v. Turner*, 24 N. Y. Supp. 793.

The court rely principally upon the want of any allegation that T. had authority to bind J. by a note, and distinguish the case from *Moore v. McClure*, 8 Hun, 557, where a note was signed "M., Agent," and recovery was allowed, on the ground that specific authority was there shown. The serious difficulty, however, seems to be that the defendant's name was not upon the face of the instrument; and that alone ought to pre-

clude a recovery. It is of the utmost importance that a note which passes as money should have all the parties upon the face of it liable. The case is clearly right, and it is very doubtful if the rule in *Moore v. McClure* would be followed in New York.

CONSTITUTIONAL LAW — GEARY ACT. — A court commissioner, finding upon examination that defendant was a Chinese laborer who had come into the United States in violation of the Exclusion Acts, gave an order, based on §§ 3 and 4 of the Act of May 5, 1892, known as the Geary Act, directing him to be imprisoned at hard labor for two days and deported. The fourth section provides that such Chinamen as defendant "shall be imprisoned at hard labor for a period not exceeding one year." On appeal from this order to the District Court, S. D. California, Ross, Dist. J., *held*, that, as imprisonment at hard labor was an infamous punishment, that part of the order violated paragraph 3, § 2, Art. 3, of the Constitution and the Fifth and Sixth Amendments, which, taken together, provide that crimes shall be punished only after indictment and trial by jury. The part of the order directing deportation was *held* good. *United States v. Wong Dep Ken*, 57 Fed. Rep. 206.

There is nothing said in the recent decision of the Supreme Court — *Fong Yue Ting v. United States*, 149 U. S. 698 — about Chinamen who are found to be in this country in violation of the Exclusion Acts; but there seems to be no inherent reason for regarding the deportation of this class of Chinamen as more in the nature of a punishment for a crime than the deportation of those who fail to register. This view is supported by the fact that throughout the Geary Act both classes are included in the term, "adjudged to be unlawfully in the United States." The only reason for interfering with Chinamen who are in this country in violation of the Exclusion Acts is that they are here in violation of those Acts; and if, as it seems to follow from the decision of the Supreme Court, so being here is no crime, no provision for the disposition of such Chinamen can be punishment for a crime. This does away with the reason which Judge Ross gives for his decision; for the ground on which he annulled the order of imprisonment was that it was punishment for a crime within the terms of the Constitution. There seems, however, good reason to contend that the order of imprisonment was depriving a "person of liberty . . . without due process of law." The government, having the right to deport on summary proceedings, can without doubt confine the alien on such proceedings until he can be conveniently deported, and cause him to defray by labor some part of the expense of such confinement. It may be that that was all the fourth section was intended to authorize, — see opinions of Billings, Severens, and Edgerton, JJ., *ubi infra*; — and in that view the decision of the principal case is right, for this was an order of imprisonment for a fixed term. This construction, however, is strained. Taking the section in its most obvious sense, that of authorizing imprisonment for a fixed term, it in no wise helps in the process of deportation; and therefore it is hard to see how the government, consistently with the Fifth Amendment, can authorize its application on summary proceedings. On this view also the correct result was reached in the principal case, because the proceedings were summary. As the Supreme Court has declared there is no crime in the case, there can be no proceedings by indictment and trial; for in the absence of statutory provisions you cannot proceed by indictment when you are not trying to convict of a crime. So we are forced either to accept the strained construction or hold the fourth section nugatory; and it will be interesting to see what the Supreme Court will hold if forced to pass upon this section. Cf. *United States v. Wong Sing*, 51 Fed. Rep. 79, Hanford, Dist. J.; *In re Ah Yuk*, 53 Fed. Rep. 781, Edgerton, Dist. J.; *United States v. Hing Quong Chow*, 53 Fed. Rep. 233, Billings, Dist. J.; *In re Sing Lee*, 54 Fed. Rep. 334, Severens, Dist. J.

CONSTITUTIONAL LAW — INTERSTATE COMMERCE — RIGHT OF CITY TO TAX. — Petitioner was arrested for failure to comply with city ordinance which provided that merchandise brokers maintaining an office within the city limits must pay a license of \$50 per annum. It was conceded that he was a merchandise broker, but it was "no part of his business" to make sales of goods situated within the State at the time of making the contract of sale or belonging to citizens of the State. On petition for writ of *habeas corpus*, *held*, by Williams, Dist. J., that this case came within the lines of *Robbins v. Taxing Dist.*, 120 U. S. 489, rather than within the lines of *Ficklen v. Taxing Dist.*, 145 U. S. 1, and that the license could not be constitutionally exacted from the petitioner, because it would be a tax on interstate commerce. *In re Rozelle*, 57 Fed. Rep. 155.

While Williams, J., was unquestionably right in holding that *Ficklen v. Taxing Dist.* did not control absolutely the decision of the principal case, the reasoning of Fuller, C. J., who gave the opinion of the court in *Ficklen v. Taxing Dist.*, seems to cover the principal case and take it out of the lines of *Robbins v. Taxing Dist.* In *Ficklen v. Taxing Dist.*, the Chief Justice, in the last sentence of his opinion, declared that the decision applied only to commission merchants who made sales for both parties within and parties without the State, and had paid their license, but refused to pay a tax

levied on the same basis as the license. He thereby undoubtedly intimated that the distinction between that case and *Robbins v. Taxing Dist.*, lay in the fact that Robbins, who was a drummer, never made or intended to make it a part of his business to drum for citizens of the State, while Ficklen did a "general" commission business, and held himself open to orders from citizens of the State; but throughout the rest of the five pages of the opinion an entirely different distinction is clearly stated. The reasoning in the body of the opinion is that the tax on the drummer was clearly a tax on his principals who resided without the State, while the tax on the commission merchant was simply a tax on the business of a resident of the State, carried on within the State; and not being exacted as a condition of carrying on business for non-residents as distinguished from residents, or as tax on goods of non-residents, it could only affect interstate commerce incidentally. This line of reasoning would take the case out of the decision in *Robbins v. Taxing Dist.*; and as the Supreme Court seems inclined of late to restrict the application of *Robbins v. Taxing Dist.*, it would not be surprising to see the principal case reversed if it should be appealed.

CRIMINAL LAW — INTERSTATE RENDITION — EXTRADITED PERSON. NOT EXEMPT FROM CIVIL PROCESS. — Persons brought into one State from another on extradition proceedings to answer to a charge of crime are subject to civil proceedings in the latter State. *Reid v. Ham*, 56 N. W. Rep. 35 (Minn.).

The court regards this decision as the logical outcome of the doctrine laid down in *Lascelles v. State*, 13 Sup. Ct. Rep. 687; 7 Harv. Law Rev. 185; which held that a person delivered up by one State to another may be tried for a different crime than that for which he was extradited. Two cases are cited in the opinion of the court, — *Williams v. Bacon*, 10 Wend. 636, and *Adrianne v. Lagrave*, 59 N. Y. 110; but the latter is hardly in point, because the accused in that case had been given up by a foreign nation. The decision seems a sound one.

CRIMINAL LAW — JURISDICTION — SHOOTING AT ANOTHER. — Defendant while standing in South Carolina shot at, but missed, a man who was in Georgia. *Held*, defendant had committed the crime of shooting at another in Georgia. *Simpson v. State*, 17 S. E. Rep. 984 (Ga.).

The ground of objection taken by defendant's counsel was that the bullets took no effect in Georgia. This objection would not seem sound, as it is clearly a breach of the peace of the State of Georgia to fire bullets into it, whether any one is hit or not. The interesting question of a double crime is raised here. There is little authority on the subject, but it seems probable that defendant could be indicted in South Carolina for an attempt to kill. *Brown on Jurisdiction*, 92.

EQUITY — TAXATION — ENJOINING COLLECTION. — Suit for an injunction to restrain a sheriff from levying a tax warrant. The complaint alleged that the valuation placed upon the property taxed was greatly in excess of its true value; that the assessor did not give the notice required by law of the meeting of the board of equalization; that no meeting was ever held; and that the plaintiffs had no opportunity given them of appearing before the board and objecting to the valuation. There was a demurrer to the complaint, which the court sustained, deciding that the plaintiffs should have tendered or paid so much of the amount of the tax levied as they conceded was due, before invoking the aid of a court of equity. Otherwise the plaintiffs would not have to pay any of the tax levied. *Welch v. Clatsop County*, 33 Pac. Rep. 934 (Ore.).

This is the first time the question has arisen in Oregon, and the case follows the generally established rule well stated by Mr. Justice Miller in *Bank v. Kimball*, 103 U. S. 732.

EQUITY — SPECIFIC PERFORMANCE. — Municipal authorities agreed with complainant that the city should extend a sewer through plaintiff's land, and it had not been done. Plaintiff seeks to enforce specific performance. *Held*, equity will not interfere, but leave plaintiff to his action at law. *Gove v. City of Buddford*, 27 Atl. Rep. 264 (Me.).

The court cites *Kendall v. Frey*, 74 Wis. 26, which went partly on the ground that a town or city will not be compelled to carry out such a contract, as it would be highly improper for a court of equity to interfere where it seemed best to the city to change its intentions as to the location of proposed public buildings, etc. This, of course, is within the jurisdiction of equity, — to determine what contracts shall be ordered to be specifically performed.

JUDGMENT — RES JUDICATA — EFFECT OF APPEAL. — Defendant, as the *administrator de bonis non* of the estate of A, widow of the testator, had brought suit in equity against present plaintiffs to compel them to account for certain parts of the personal estate of A which A had given into their hands during her lifetime. It was there held

that by testator's will A was clothed with full power of disposition of the personal estate, and that such disposition thereof, by her, to the present plaintiffs, was absolute and binding. The said administrator had thereupon appealed from that judgment to the Supreme Court of the United States, which appeal was still pending when plaintiffs brought the present suit against said administrator to recover amount of a legacy to them by testator, due after A's death. Defendant answers, setting up that plaintiffs have already in their hands property received from A during her lifetime which should be applied to payment of this legacy. *Held*, that this matter is *res judicata* by the final judgment in the previous suit between the parties, and the fact that an appeal from that judgment is pending does not affect the force of that judgment as a *res judicata* and a bar to this defence. *Smith v. Schreiner*, 160 N. W. 160 (Wis.).

This decision, that a pending appeal from a final judgment will not prevent the application of that judgment as a *res judicata*, opposed as it is to the weight of authority in the United States, shows the growing tendency to extend the doctrine of *res judicata* as a bar to multiplicity of actions between the same parties for the same cause. The Supreme Court of Wisconsin indorses a similar principle in *Neuman v. State*, 76 Wis. 112, and follows the rule as established in New York, *Parkhurst v. Berdell*, 110 N. Y. 386; in Indiana, *Burton v. Burton*, 28 Ind. 342; and in some other States.

MANDAMUS — MUNICIPAL BOARDS. — *Held*, that it is the better practice to join, as parties defendant in mandamus, all the members of the board which, by a vote of the majority, has been placed in the position of a recusant body, although the minority has shown an entire willingness to do the act required. The members of a co-ordinate body of the city government which is not recusant should not be made parties defendant. *Littlefield v. Newell*, 27 Atl. Rep. 110 (Me.).

Both propositions are thoroughly reasonable. The practice of treating the recusant body as a whole, apart from the individual disposition of its members, is more in accord with strict governmental relations than the contrary view, which is well stated in *Lamb v. Lynd*, 44 Pa. St. 336.

MUNICIPAL CORPORATIONS — LIABILITY FOR TORT. — The city of Brooklyn, having control of the general subject of the discharge of fireworks, granted a permit to one A. In the course of the discharge, the plaintiff's house was injured by the negligence of A. *Held*, that the city was liable, whether its act in this particular case was *ultra vires* or not, for it was in the power of the city to act in regard to such a matter. *Speir v. City of Brooklyn*, 34 N. E. Rep. 727 (N. Y.).

The general statement in regard to the liability of a municipal corporation for *ultra vires* acts is undoubtedly correct; but it may be doubted if the city is liable at all in such a case as this. See *Hill v. Boston*, 122 Mass. 344; *Tindley v. Salem*, 137 Mass. 171; 2 Dillon on Munic. Corp., §§ 965, 966, in which the distinction is made that a municipal corporation is liable for injuries when acting in its corporate capacity, — *i. e.*, when it is incidentally benefited, — but not when it is acting purely for the benefit of the public, whether voluntarily, or because of an obligation imposed in its charter. This distinction certainly applies to this case, and it is submitted that this decision is erroneous. *Lincoln v. Boston*, 148 Mass. 578, is directly *contra* to the principal case.

PARTNERSHIP — MARRIED WOMEN — SEPARATE ESTATE. — The payee of a note executed by the firm A. D. & Co. filed a bill in equity to subject the separate estate of S., a married woman who was a partner, to the payment of the note. S. had put her separate estate into the partnership business, but without an express agreement that it should be liable to firm creditors. *Held*, the separate estate of a married woman cannot be bound by implication, but only by express agreement. Snodgrass, J., dissented on the ground that "the creditors, the business, the dealing in and only with a separate estate, . . . are all to be considered;" and so a married woman who holds herself out as engaging in a partnership with her separate property in fact contracts to bind it, though not in terms. *Theus v. Dugger*, 23 S. W. Rep. 135 (Tenn.).

The majority of the court follow previous Tennessee decisions, where it is asserted that an express agreement is necessary to bind the separate estate of a married woman. 8 Humph. 209; 4 Cold. 3; 2 Lea, 730; 13 Lea, 481; 85 Tenn. 412. Most of the previous decisions in the jurisdiction, however, were cases of specialty obligations of a married woman, where no intention to bind her separate property appeared on the face of the instrument. It has been said in other States than Tennessee, with some force, that to hold these obligations, simply as such, binding on the separate estate would destroy the fundamental requisite of the equitable remedy against it; namely, the agreement of the married woman to bind it. If, on the other hand, extrinsic evidence be allowed to show such an agreement, a written instrument is being altered. 22 N. Y. 450. Neither of these objections has prevailed in England, nor in some of the States in this country, where the general obligation of a married woman, and nothing more,

has been held to bind her separate estate. 1 Craig & Ph. 48; 3 Eq. Cas. 781; 117 Mass. 382; 15 Wis. 365; Daniel Neg. Inst., 3d ed., §§ 247 ff. These objections, however, which may exist in the bond or note of a married woman, do not exist in the principal case, and in following such cases we think the Tennessee court has gone astray. The note here is not the note of S., but of the partnership. As is urged, "where the married woman enters into a partnership . . . a legal entity is thereby created." Her obligation is not on the note, but arises solely out of her contract with the firm. The only question in the case, then, is whether her contract must in terms bind her separate estate. One fails to see why the ordinary rule of contracts should not apply here, and why actions should not speak as loudly as words. "If," says Vice-Chancellor Kindersley in *Matthewman's Case*, 3 Eq. Cas. 787, "the circumstances are such as to lead to the conclusion that she was contracting, not for her husband, but for herself, in respect of her separate estate, that separate estate will be liable to satisfy the obligation." We submit that this is the correct doctrine, and the opinion of the minority in the principal case ought to have prevailed.

PERSONAL PROPERTY — PRIORITY OF CHATTEL MORTGAGE OVER LIEN. — The statutory lien of a liveryman is subsequent and subject to a prior recorded chattel mortgage on the horse given by the owner. *Sullivan v. Clifton*, 26 Atl. Rep. 964 (N. J. L.).

This case is supported by the weight of authority. Minnesota holds *contra*; but under the statute there in force no other conclusion could be reached. 36 Minn. 303. Kansas is squarely opposed to the doctrine of the New Jersey case. 21 Kan. 257. There can be no doubt of the soundness of the view advanced by the New Jersey court. "It is not to be supposed that a statute giving a lien for the keeping of an animal was intended to violate fundamental rights of property by enabling the possessor to create a lien without the consent of the mortgagee when the person in possession could confer no rights as against the mortgagee by a sale of the animal." Jones on Liens, § 691.

QUASI-CONTRACT — RECOVERY OF MONEY PAID UNDER MISTAKE — EFFECT OF DEFENDANT'S CHANGE OF POSITION. — Plaintiff, as surety of an executor, having become liable to the legatees on account of misappropriation by the executor, paid over to defendant, who was executor of A, one of the legatees, the amount of her legacy. A had died without issue before the testator, and so the legacy had lapsed; but plaintiff was ignorant of this fact. Plaintiff, subsequently learning of A's death, demanded the money of defendant; but the latter refused to refund, having by that time distributed the whole amount among A's legatees. *Held*, that plaintiff could recover the amount paid, in an action of assumpsit. If defendant was acquainted with the circumstances when he received the money, he was bound to have communicated them to plaintiff, and his payment over to the legatees would be no defence; and even assuming that defendant was ignorant of the facts, he had not changed his position so as to make it inequitable for plaintiff to recover. *Phettleplace v. Bucklin*, 27 Atl. Rep. 211 (R. I.).

The decision is undoubtedly right on the assumption that defendant received the money with full knowledge of the facts, since he would thus have acted fraudulently, and no equity could arise in his favor. But on the view that defendant as well as plaintiff was under a mistake, the case, it is submitted, is open to criticism. The ground for recovery of money paid under mistake is that it is against equity and conscience for defendant to keep it. As long as the parties remain *in statu quo*, the right to recovery is clear; but if because of a change of circumstances defendant can show that it is not inequitable for him to retain the money, there should be no recovery. In the present case, defendant, in consequence of plaintiff's mistake, and through no fault of his own, by paying over the money to the legatees had changed his position so that he would suffer loss if obliged to refund. The parties were no longer *in statu quo*, and it is hard to see how it was equitable, under such circumstances, for plaintiff to be indemnified at defendant's expense. "It seems difficult to establish, in a case where the defendant cannot be said to be more responsible for the mistake made by the plaintiff than is the plaintiff himself, that he should in conscience return to the plaintiff money paid under mistake, where the result of such re-payment is to throw a loss upon the defendant which he would not have suffered, had not the payment been made." Keener on Quasi-Contracts, 67. Since one of two innocent parties must suffer, the more equitable solution would seem to be to let the loss remain where it has fallen. This view is supported by the following cases: 5 Taunt. 144; 4 B. & C. 281; 5 Pa. 516; 8 S. & R. 402; 7 Mo. App. 150; 63 N. Y. 253; 14 S. W. Rep. 1094; 8 Neb. 104; Keener on Quasi-Contracts, 59-72. It is also sustained by the rule that an innocent donee of property which had been acquired by fraud is not liable if he transfers it before notice of the equity. 30 Wis. 516; 65 Ia. 193. In accord with the principal case, see 40 N. Y. 391; 91 N. Y. 74; 6 Q. B. D. 234.

REAL PROPERTY — ADVERSE POSSESSION. — Defendant railroad company had

bought certain land of plaintiff's father, and in putting up the fence made a mistake in its location, leaving the vendor in possession of a piece of land that belonged to the company, according to exact measurement. The vendor and his son, the plaintiff here, have occupied the land for more than twenty years, thinking the fence was on the true line. *Held*, one who by mistake occupies land, not covered by his deed, for twenty years or more, with no intention to claim title beyond his actual boundary, does not thereby acquire title by adverse possession beyond the true line. *Preble et al. v. Maine Central R. Co.*, 27 Atl. Rep. 149 (Me.).

This doctrine grew up from the case of *Brown v. Gay*, 3 Greenl. 126, improperly, as it seems. It was there decided that if B encloses a parcel of A's land through mistake, it does not operate as a disseisin to prevent A passing the land by deed. It does not decide that there was no disseisin at all, only not such an one as will preclude A from passing title; yet it is treated as deciding the former point. See 5 Me. 204; 31 Me. 345. In 51 Me. 575-584 the court cites *Brown v. Gay* as deciding that there is no disseisin where there is mere occupation without any intention to claim title, "as where a fence is erroneously erected on the dividing line. But if in such cases there is an intention to claim title, . . . though the line is fixed by mistake, it is a disseisin." 56 Me. 265; 64 Me. 138; 72 Me. 331; and 73 Me. 105 follow this. In the principal case the court recognizes the distinction taken in the cases cited, saying that here there was no absolute intention to claim to the fence, but only a conditional one, provided that the fence was on the true line. This distinction is too fine. As Hosmer, C. J., says in *French v. Pearce*, 8 Conn. 439, "Intention is an essential ingredient. But a person who enters on land, believing it to be his own, does enter with that intention. . . . The very nature of the act is an assertion of his own title and a denial of all others." In accord with principal case, 34 Ia. 148; 35 Kans. 85; 33 Ala. 38; 28 Mo. 481. Subsequent decisions in Alabama and Missouri have materially lessened the force of the last-named cases; see 69 Ala. 332; 70 Mo. 372. *Contra*, 30 Ohio St. 409; 31 Minn. 81; 44 Minn. 432; and cases cited by Wood on Limitations, 2d ed. § 263.

REAL PROPERTY — DEED — DOCTRINE OF RELATION. — On the 26th of March, 1890, the plaintiff entered into a contract for the sale of certain timber-land. The purchaser paid the consideration called for on May 5, 1890, and on the same day the plaintiff delivered to him the deed of conveyance, dated March 26, 1890. After the making of the contract, and before the delivery of the deed, the defendant, a stranger, entered upon the land and cut large quantities of timber. In defence to an action of replevin, he now contends that the deed related back to the contract of sale, and that, consequently, at the time of the trespass, the title to the land was not in the plaintiff. *Held*, for plaintiff, that the doctrine of relation is a fiction of law adopted solely for the purpose of justice, and is applied only for the protection and security of persons who stand in some privity with the owner of the land, and that, therefore, the defendant in this case, being a mere trespasser, could obtain no benefit from it. *Stahl v. Lynn et al.*, 56 N. W. Rep. 188 (Wis.).

This is a true exposition of the law of relation. The title to the land, until the delivery of the deed, is in the seller; but if this is unfair to the buyer or those claiming under him, the court will, after the delivery of the deed, consider that the title passed at the time of the making of the contract. With regard to strangers possessing no equity, however, it is as if no such doctrine as that of relation existed. Washburn on Real Property, vol. iii. p. 309.

REAL PROPERTY — EASEMENT OF LIGHT — PRESUMPTION OF LOST GRANT. — *Held*, that in the case of light the presumption of a lost grant is not to be regarded as a matter of law, but as a question of fact, in view of all the circumstances. *Wheaton v. Maple* (1893), 3 Ch. 48 (Eng.).

For a discussion of this case see the Notes.

REAL PROPERTY — PARTY-WALLS — COVENANT — LIABILITY OF ASSIGNEE. — In 1876 one Steele covenanted in the usual form with one Small respecting a party-wall to be erected at once by the latter, that Steele, his heirs or assigns, should pay to Small, his heirs or assigns, one half the cost of said wall whenever Steele, his heirs or assigns, should use the same. Small built the wall, and subsequently assigned his land, reserving the covenant, which he later assigned to the plaintiff. Steele's land was assigned to defendant, who by her tenant built upon her land, using the wall in question. *Held*, that as to Small, the covenantee, the covenant did not merge in his assignment of his land, but remained with him a personal covenant, which he might properly assign, apart from his land, to plaintiff. That as to covenantor, the covenant ran with his land so as to bind his assignee, the defendant, when he used the wall. *Pillsbury v. Morris*, 56 N. W. Rep. 170 (Minn.).

This decision follows that in the leading case on the subject in Indiana, *Conduit*

v. Ross, 102 Ind. 166, which seems to be correct on principle. It is apparent that that party who uses the wall and no other should pay for it, and so the burden of the covenant properly runs with the land of the covenantor to that owner who uses the wall; and it would seem equally clear that the covenantee in building the party-wall, one half resting on the land of the covenantor, does not thereby attach a benefit to his own land, but rather obtains for himself a personal claim upon the party who takes to himself the benefit of the wall so built, and accordingly the benefit is a personal one to covenantee, and should be assignable by him apart from his land. The prevailing opinion in this country, however, is that the benefit as well as the burden of such a covenant runs with the land to which it relates. *Savage v. Mason*, 3 Cush. 500. A third view, that the covenant, though intended by the parties to run to assigns, is a personal agreement only, is found in *Cole v. Hughes*, 54 N. Y. 444; *Gibson v. Holden*, 115 Ill. 199; *Behrens v. Hixie*, 26 Ill. App. 417; and *Kells v. Helm*, 56 Miss. 700.

TORT — DAMAGES FOR CONVERSION OF STOCK. — *Held*, that the measure of damages for the conversion of stock by a pledgee is the value of the stock at the time it was converted, less the sum for which it was pledged, with interest. *President and Directors of Franklin Bank v. Harris*, 26 Atl. Rep. 523 (Md.).

This decision is supported by the weight of authority. (See Sedgwick on Damages, vol. 2, § 519.) A more just rule, however, would seem to be laid down by *Baker v. Drake* (53 N. Y. 210), that the value of the goods in such cases should be their highest market price between the conversion and the time when the owner might reasonably have replaced them. By such a rule the owner is placed much more nearly in his original position; for if within a reasonable time he does not repurchase stock in the market, it may be assumed that he does not consider the speculation profitable, and would sell the stock if he had it. Whether he repurchases or not, he is indemnified. If he has repurchased stock, he is repaid the most that he can possibly have paid for it; and if he has not, he is allowed the highest price for which he could have sold it. By the rule followed in this decision, however, if the conversion occurs on a rising market, the whole gain inures to the benefit of the wrongdoer; and if the innocent party wishes to place himself in his original position by the repurchase of stock, he must pay its increase in value out of his own pocket.

TORT — LIBEL. — A postal card sent by a bank to a correspondent from whom it had received a draft on Bowdye Bros. & Co., a mercantile firm, for collection, and reading, "B in hands of notary," while in fact the draft had been paid to the bank, is libellous *per se*. *Continental Nat. Bank of Memphis v. Bowdye*, 23 S. W. Rep. 131 (Tenn.).

The counsel for defendant below contended that the words here used are ambiguous in their application and meaning, and are not libellous *per se* on the plaintiffs below, without extraneous facts or innuendo. The court *held*, however, that all that is necessary is that the words must refer to some ascertained or ascertainable person, and that person must be the plaintiff. It is, of course, well settled that words which are used to injure a person in his profession, trade, or business are actionable *per se*, without proof of special damage. As to the words being ambiguous in their application, the following rule, stated by Lord Campbell, is in point: "Whether a man is called by one name or whether he is called by another, or whether he is described by a pretended description of a class to which he is known to belong, if those who look on know well who is aimed at, the very same injury is inflicted, the very same thing is in fact done, as would be done if his name and Christian name were ten times repeated." *Newell on Defam.*, 259. If asterisks be put instead of the libelled person's name, it is sufficient that those who know the plaintiff should be able to gather from the libel that he is the person meant. It is not necessary that every one should understand it. *Bourke v. Wancu*, 2 C. & P. 307. "All the libellers in the kingdom know now that printing initial letters will not serve the turn." *Per* Lord Hardwicke, in *Rouch v. Garton*, 2 Atk. 470. The decision of the principal case is undoubtedly correct.

TORTS — QUASI-CONTRACTS — DAMAGES. — A person called on the manager of defendant printing company, and offered, for a commission of 40 per cent, to bring him the printing of the Mercantile Appraisers' List at 30 cents a line for four publications. A State statute authorized certain State and county officers to have this list published in four newspapers, and to pay therefor the usual rates of advertising, not exceeding 30 cents a line, for four insertions, to be paid by the county, which should be reimbursed by the State. The manager received the county treasurer's check for the full amount, and turned over 40 per cent of it, in cash, to the person with whom he dealt. *Held*, (1) that the circumstances were such as to give the manager notice that public officers were making private profit out of their public duties; (2) that for the negligent participation of the manager in such wrong against the State, the latter can maintain an action in tort against the company; and (3) that the amount of damages which the

State is entitled to recover is the amount of the commissions, with interest. *Commonwealth v. Press Co.*, 26 Atl. Rep. 1035 (Penn.).

It was an error on the part of the Pennsylvania court to hold that the plaintiff, on the facts proved in this case, could not recover from the defendant, in an action of assumpsit for money had and received, the amount of the commissions, with interest. The decision as to this point proceeds upon the ground that "the defendant does not have in its possession any money belonging to the Commonwealth. It did have such money in its hands for a moment, but only for a moment." At that moment, as the court impliedly admitted, the defendant, who was a tortfeasor, would have been liable to the plaintiff, upon the familiar doctrine of "waiver of tort," in a quasi-contractual action; and it would seem a commonplace in the law of quasi-contract that such defendant cannot destroy or reduce the amount of its liability by showing that it transferred the wrongfully acquired property in whole or in part to another. This is rendered apparent when one bears in mind that the payment of part of the proceeds of the check to the party who proposed the tortious transaction was a part of such transaction. In connection with this case it is interesting to find that Mr. Keener, in his recent work on Quasi-Contracts, while discussing the nature of the liability of joint tortfeasors where the tort is waived, has been careful to avoid the conclusions reached in *Commonwealth v. Press Co.* See Keener on Quasi-Contracts, pp. 200-203.

TRUSTS—PURCHASER WITH NOTICE FROM PURCHASER WITHOUT.—A purchaser of land with notice of prior equities from a purchaser without notice gets a clear title. *Klinger v. Lewler*, 34 N. E. Rep. 698 (Ind. Sup. Ct.).

The decision is correct. The court quote as a cogent reason for the rule 2 Perry on Trusts, § 830, that such a purchaser is protected, "not on his own merit, but on the merit of the innocent purchaser; for if such a purchaser could not sell the estate, he would be deprived of one of the valuable attributes of his property." It is respectfully submitted that the reason given by the court in their quotation from the learned author of Perry on Trusts is defective, in that it looks at the question from the standpoint of the wrong party. Were it the merit of the innocent purchaser which protects one who buys from him, then a fraudulent trustee or vendee who regains the land from an innocent purchaser to whom he has sold it would take the title free from any equities. Such, however, is not the law. 2 Perry on Trusts, § 830, note 5. 1 Ames' Cases on Trusts, 287, second paragraph, where cases are fully collected. Justice does not permit a dishonest trustee who sells trust property to an innocent party to buy it again and keep it for himself; equity will not allow him to set up his own wrong in defence. The truth is the defendant is protected on his own merit. He has obtained a legal right without being in any sense a party to a dishonest transaction, and he has paid value for it; consequently he has all the privileges of a purchaser without notice.

WILLS—CHARITABLE BEQUESTS.—A direct bequest to an unincorporated but regularly organized charitable association, is valid, although no limitation be made as to its use. *Hadden v. Dandy*, 26 Atl. Rep. 464 (N. J.).

The point is a new one in the State, but the case follows *Wellbeloved v. Jones*, 1 Sim. & S. 40, and quotes the case in 35 Pa. 316, as a direct authority. There the theory is laid down that as the rules of the society provide for the application of its funds to charitable purposes, the bequest must be taken to be a charitable one, and is therefore not too indefinite.

REVIEWS.

A TREATISE ON THE LAW OF QUASI-CONTRACTS. By William A. Keener. Baker, Voorhis, & Co. New York. pp. xxxii and 470.

Professor Keener has rendered a great service to the law and the legal profession in writing a book on quasi-contracts. So much confusion of thought, resulting in errors of decision, lurks in the term "contract" implied in law that the only possible way to satisfactory treatment of this branch of the law lies in ceasing to speak or think of such obligations as forming part of the law of contracts. In no other way will the dissimilarity of quasi-contracts from true contracts, and their similarity to constructive trusts, obtain recognition; and without recognition of this dissimilarity and similarity, correct reasoning on the cases is impossible. All this has been pointed out in recent years in a few scattered judicial opinions, articles in law reviews, and statements in books on various subjects; but the impression of the truth as yet made on the legal profession is slight. There is reason to hope that a text book wholly devoted to the subject, and discarding altogether both in the title and in the text the use of the word "contract" for an obligation imposed by law, will lead to a more general understanding of this difficult branch of the law.

Professor Keener's handling of his subject is thorough and careful. The book is evidently the result of long and careful study of the cases, and reflection on the principles underlying them. Doubtless because of the lack of systematic treatment of the subject, to which we have adverted, there has been scant discussion of the general principles governing the cases, which have been dealt with in groups by the courts, the relation of one group to the others not being generally observed. Professor Keener, following the division suggested by Professor Ames (*The History of Assumpsit*, 2 *Harv. Law Rev.* 53, 64), finds in the doctrine that no one shall be allowed to enrich himself unjustly at the expense of another, the general basis of recovery in quasi-contract in the great class of cases where the plaintiff's right is founded neither on a record, nor on a statutory, official, or customary duty. While the doctrine of unjust enrichment has not been acknowledged in terms to any great extent by the courts, we believe no one who examines the cases cited by Professor Keener can fail to admit that it furnishes the best key to the decisions. The author's endeavor is evidently to elucidate principles, not simply to compile a digest of decisions; and he does not hesitate to disagree with cases which he believes to be contrary to principle. An excellent illustration of this is his treatment of the doctrine that mistake of law gives no right of recovery. His statement of the development of the doctrine, showing the slight foundation on which it originally rested; his criticism of the doctrine; and his dealing with the question, What is a mistake of law, and what is a mistake of fact? are admirable. A careful reader might not wholly agree with a few of the author's conclusions; for instance, in regard to cases arising from payment of money under mistake as to the genuineness of negotiable instruments. The cases denying recovery to a drawee who has paid an innocent holder of a draft upon which the drawer's signature is forged seem adequately explained by the doctrine of equal equities, and the cases allowing recovery to a drawee

who has paid an innocent holder of a draft upon which an indorsement in the holder's chain of title is forged, seem sufficiently distinguished by the suggestion that the holder's right really arises from subrogation to the rights of the true owner. The ingenious case put on page 158 does not convince us that subrogation is not the true ground of recovery. If the question were fully argued, it is perhaps not certain that a recovery would be allowed, and if allowed, it would only indicate that the wife had a right, though deprived of a remedy for reasons of public policy, and that the drawee, not suffering under any difficulty as to remedy, was allowed to enforce the right. The direct enforcement of an equitable right as if it were a legal right is no novelty in the law of negotiable paper. Again, the criticism on page 38 of *Taylor v. Hare* and similar cases denying a recovery of license fees paid for the use of a patented invention on the patent proving invalid, does not seem to us merited. Every one who deals with patents knows the possibility of their being subsequently held invalid. It is something of which the licensee may fairly be said to run the risk. He prefers to pay a license fee rather than contest the patent, and he gets what he pays for. The case put by way of illustration on the same page of a man paying rent for his own land is obviously not in point. In that case the defendant is a disseisor, a tort-feasor, and is liable as such to account for the rents. The plaintiff is, therefore, entitled to recover the rents received by the defendant whether paid by himself or a third person.

But however we may differ occasionally from the author's views, we feel sure that no one can fail to admire the close, logical reasoning that supports them. We venture to predict that this book will be for many years the recognized authority on the subject with which it deals, and we shall be disappointed if it does not exert a noticeable influence towards uniformity of decision.

S. W.

A TREATISE ON THE LAW OF INSURANCE (excepting Marine Insurance).

By Arthur Biddle, M.A. Philadelphia: Kay and Brother, 1893.
2 vols. pp. civ, 649; 764.

This is a thorough, exhaustive, and well arranged and digested treatise upon its subject. Practically all decisions relevant to insurance are included; they are put where they belong, and a capacious index furnishes a ready guide. The arrangement, by its scientific classification of the subject, furnishes firm ground for the propositions advanced, and presents them in logical order. "Books," "Parts," "Chapters," "Divisions," and "Sections" bring one finally to the propositions determined by the cases. The order of the arrangement is that of time, and carefully follows out the course of the contract of insurance from its inception between the parties to the final verdict for damages.

The general practitioner and the insurance lawyer will find the book a very valuable aid in the labor of collecting and preparing authorities. But together with many of the text-books which daily come from the press, it has one serious fault. Beyond the orderly arrangement which leads a lawyer to the cases which he wishes, there is nothing. Little, if any, criticism of cases is inserted, and upon the development of the law of insurance, its reason for being, and its possibilities, we are given no assistance. Cases contradictory in result are regularly condensed and put side by side in the text without a suggestion that either is wrong, or an

offer of any ground upon which to distinguish them. Rarely (as in secs. 523, 1291) we get a brief, pleasant mention of the author's views; but when (in section 1032) we are referred to a "discussion" of the effect of fraud on the avoidance of a contract, we find only a dry statement of some decisions. The book may, therefore, be contrasted, to its disadvantage, with those which do attempt to explain the law. It is nevertheless good of its kind, and a monument of hard, conscientious, in its way fruitful labor. It is no contribution to the advancement of the law, but it ought to be of assistance to any practising lawyer.

R. W. H.

THE MARK IN EUROPE AND AMERICA. A Review of the Discussion on Early English Land Tenure. By Enoch A. Bryan, A.M., President of Vincennes University, Indiana. Boston: Ginn & Co., 1893, pp. vi, 164.

This little book, the author says in the preface, was written during a year of rest from his regular duties and while investigating the subject at Harvard University. It is an examination of the theory of the Germanic mark and of the earlier and later evidence adduced in support of that theory. The author calls attention to the fact that the advocates of State ownership of land look upon the theory of the mark as affording an historical basis for their scheme, and that it may in the future play an important part in practical politics. The review of the evidence is impartial, but President Bryan seems on the whole disposed to agree with such destructive critics as Fustel de Coulanges and Seebohm in attributing a comparatively small influence to the mark in the development of our present institutions. The book is pleasantly written in a simple style, and will put the general reader in possession of the principal facts and the different views relating to the mark. It contains an index and a list of the authorities referred to.

G. R.

COMPARATIVE ADMINISTRATIVE LAW. An Analysis of the Administrative Systems, National and Local, of the United States, England, France, and Germany. By Frank J. Goodnow, A.M., LL.B. 2 vols. New York: G. P. Putnam's Sons, 1893. For sale by W. B. Clarke & Co.

The author has done a great service to jurists. His definition of the subject as "that part of the public law which governs the organization and action of the administrative power in the government" is sufficient to indicate its importance.

As a supplement to constitutional law, the book is very valuable for its analysis, classification, and historical summary, and not the less so from the fact that it is purely empirical rather than speculative.

Professor Goodnow has scientifically distinguished his subject from other closely related branches of the law, and points out that a recognition of this distinction would have prevented such a decision as that in the Dartmouth College Case. A chapter particularly thoughtful is that which contains an examination into the nature of the powers inherent in each department of government; but the main purpose of the book, the comparison of the administrative systems of the four countries, is what constitutes its chief merit.

C. P. H.

ABNORMAL MAN: being Essays on Education and Crime and Related Subjects; with Digests of Literature and a Bibliography. By Arthur MacDonald, Specialist in the Bureau of Education. Washington: Government Printing Office, 1893. 8vo, pp. 445.

This "circular of information" contains the result of a number of essays published by the author in foreign and domestic periodicals, together with a very full bibliography, covering over two hundred octavo pages. The text of the book conveys much interesting information not very well digested or arranged, and includes a number of reviews or abstracts of the principal works upon criminology. The chief value of the publication, however, lies in the bibliography, which is believed to be the first in its field, and which is certainly sufficiently complete to meet the author's aim in serving as a basis for independent study "of any phase of the subject."

E. B. A.

HANDBOOK OF THE LAW OF BILLS AND NOTES. Designed especially for the use of Instructors and Students in Law Schools. By Charles P. Norton, Lecturer in the Buffalo Law School. pp. iv, 376. St. Paul, Minn.: West Publishing Co., 1893.

This book is intended by Mr. Norton "for students in law schools and law offices." It contains a careful statement of the elements of the law and theory of bills and notes. The leading principles are well picked out in large-faced type, and appropriate lists of questions are put at the ends of the chapters. Its only faults are due to the rigid limits placed upon it by the author; for it does not attempt to give familiarity with the theory and practice of the law by going, even occasionally, into the intricate and doubtful or the practical questions. It is only a book for beginners, and to such it should prove serviceable.

R. W. H.

THE AMERICAN DIGEST ANNUAL FOR 1893. Sept. 1, 1892, to Aug. 31, 1893. Prepared by the Editorial Staff of the National Reporter System. St. Paul, Minn.: West Publishing Co., 1893.

This digest, probably the best of its kind, appears with marvellous promptitude. The size is about the same (pp. 5715) as last year, and there are few, if any, changes in the admirable facilities for reference and cross reference.

R. W. H.

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THE FICTIONS OF THE LAW: HAVE THEY PROVED USEFUL OR DETRIMENTAL TO ITS GROWTH?¹

I.

THE literature of legal fictions² has one curious peculiarity. While upon other legal subjects the opinions are in general as various as the individual writers, and are, at least in seeming, put forward not with conviction, upon this topic it would appear there are but two opinions, diametrically opposed, and each supported with the greatest warmth. These two opinions are, apparently, that fictions are an unmitigated evil, a scandal and disgrace, and that they are one of the chief glories of the common law.

¹ This essay received the prize offered by the Harvard Law School Association to the graduating class of 1893. — EDITORS.

² The subject of this paper possessing, as it does, an interest rather curious than practical, it has seemed possible and desirable on that account to relieve the reader to some extent from the usual tyranny of foot-notes by collecting at once the general references:—

Adams on Eject. c. 1; Bentham (ed. Bowring): Frag. on Gov't, 235 n., 243; 5 Works, 13, 92, 234, 510; Best on Ev. 313; Best on Presump. c. 2; 3 Blk. Com. 43, 107; Challis Real Prop. c. 18; 2 Cruise on Fines, 1, 258; De Lolme on Const. Eng. 104-7; Ferguson's Moral Phil. pt. 5, c. 10, § 3; Digby, Hist. Real Prop. c. 5, § 2; Maine, Anc. Law, c. 2; Rawle, Cov. for Title, 1-10; 1 Reeves Hist. Eng. Law (ed. Finlason), 73-6; Wms. on Real Prop. c. 2, pp. 62, 76, 237; Wright on Tenures, 2, 156; 2 Cent. L. J. 582; 15 Ir. L. Times, 612; 1 Jur. Soc. Papers, 360; 2 Legal Rep. 222; 9 Monthly L. Mag. 172; 9 N. J. Law Journal, 360; 2 Quar. L. Journal, 305.

Bentham was particularly severe in his denunciation of fictions. Perhaps he was a little less intemperate than usual when he said, "Fictions are falsehoods, and the judge who invents a fiction ought to be sent to jail." Later he adds: —

" 'Swearing,' says one of the characters in a French drama, 'constitutes the ground-work of English conversation.' Lying, he might have said, without any such hyperbola, — lying and nonsense compose the ground-work of English judicature. In Rome-bred law in general, — in the Scotch edition of it in particular, — fiction is a wart which here and there deforms the face of justice. In English law, fiction is a syphilis which runs in every vein, and carries into every part of the system the principle of rottenness."

In the "*Examen Legum Angliæ*; or, The Laws of England examined by Scripture, Antiquity, and Reason,"¹ the author, whose name does not appear upon the title-page, says "that all manner of pleadings and proceedings, both in law and equity, are stuffed with falsehood and lies."

There is no uncertainty about the views entertained by these two learned writers, and there are a great many degrees separating the point of view from which they look and that of the writer of the following extract from an article in the "Monthly Law Magazine:"² "To us . . . it is always a matter of extreme delight and refreshment to turn to those exquisite fictions which both adorn and simplify our law; mingling utility with sweetness, and tending to the noblest end to which poetry can devote itself, namely, to benefit mankind and render them happy."

It must be admitted that some of the fictions met with in daily practice up to within very recent times were calculated to awaken astonishment in any mind unhackneyed by perfect familiarity. To find that in order to sue in an English court upon a contract actually made at sea it was a necessary averment that the contract was made at the Royal Exchange; and in an action to try the title to land, to find set forth a wholly fictitious lease and entry, the lessee being a fictitious personage, and a subsequent ouster by a non-existent ejector, — might well seem to require strong affirmative justification. The amusing writ of *Quo minus*, by which the Court of Exchequer gained jurisdiction in certain cases, which proceeded upon the allegation that the plaintiff was debtor to the

¹ London, 1656.

² 9 Monthly Law Mag. 172.

Crown and unable to account through the defendant's default; the equally curious *Latitat*, setting forth that the defendant had committed a trespass and was in the custody of the marshal of the Queen's Bench, by which that court obtained a certain jurisdiction; the losing and finding in the action of trover; the proceedings in conveyances by fine and common recovery, — these and many others might well appear open to more than mere criticism.

Viewing these fictions in this fragmentary and dislocated form; taking them as they stand, disconnected from their surroundings, from the times and needs which gave them being, — there is at least a *prima facie* case, it would seem, for those who attack them.

But is such a detailed view allowable? Taken separately, these various false averments and denials, collusive suits, presumptions and relations, may appear not merely absurd, but positively unjust and wrongful. Looked at in their proper relations; noting their cause and effect; the people among whom and the conditions under which they flourished, — the absurdity and injustice may perhaps disappear.

It will be the object of this article to gather up a few of these old bits of the bony framework of the law, to assemble them in their proper relations one to another, and, for the occasion, to attempt what may be called a restoration.

The law of to-day is the law of yesterday modified and expanded by the needs of the new day. It is to this capacity for modification, this prompt effort to meet the constantly arising needs of society, that English-speaking people owe much of their liberty and happiness. A community whose legal system is slow to respond to the wants of those for whose government it is instituted must of necessity be cramped and retarded in its development. It seems evident that this adaptability and ready response to the wants of the people is one of the greatest excellencies that any system of law can possess.

What are the means by which the law is modified and expanded; that is, what are the means by which the law is changed?

Roughly speaking, the means of change are two, —

1. Acts of Legislative Power.

2. Acts of Judicial Power.

(a) Judicial Decisions.

(b) Judicial Fictions.

It will be observed that judicial fictions have been classed as a form of judicial power. The classification is the conventional one,

and though convenient enough, it may be observed at the outset that it is not exact. Judicial fictions are, in truth, but the hand-maidens of the only true judicial power, — that of decision. For the present, however, they will be dealt with in the generally accepted fashion, as the product of a power distinct from that of decision.

Under any form of civilized government the common people are the real generators of law. Their influence may be slow in asserting itself; the popular feeling may take long to crystallize into a definite want; but the want, once existing, presses continually for recognition. It may be stifled for a time, but sooner or later the demand must be met and satisfied. In the satisfaction of these popular needs, legal fiction has been a favorite instrument. While it cannot be said that it has always been the best *possible* means to attain the desired end, it can with truth be said that it has usually been the best *available* means. The apathy of those whose interests were not immediately affected; the lack of any union among the people to enforce directly the satisfaction of their desires; the combination and active opposition of those whose interests might be unfavorably affected by any change in the existing law; together with the fact that those opposed to the will of the people frequently controlled the machinery of direct legislation, — these reasons excused and perhaps justified a resort to indirection. The judges, who were in many ways close to the people, able to understand their wants, and in a position to give voice and form to them, could and did do it.

Looking at the matter in a large way, therefore, it may be said that legal fictions obtain what vitality they have originally from the people; for although not directly created by them, they are invented to meet an assumed want, and the fact that they flourish is itself an evidence that the want did exist and is in some sort met.

Mr. Best, in his books upon Evidence and upon Presumptions, defines a fiction as "a rule of law which assumes as true, and will not allow to be disproved, something which is false, but not impossible." Other legal writers give definitions not substantially different.

While this definition may be a good one as a matter of theory, as a practical matter it is too narrow to include various devices which are commonly regarded as fictions, and which are as fictitious in their character, and as truly fictions, although of a different kind, as those which fall under the definition of Mr. Best. A definition

which should be made wide enough to include these various other devices would, upon the other hand, be as much too wide practically as Mr. Best's definition is too narrow, for the line has been drawn at no natural point of cleavage, but arbitrarily. The definition here suggested must be taken with this in mind: A legal fiction is a device for attaining a desired legal consequence, or avoiding an undesired legal consequence. Of these devices there are three principal sorts: —

- 1st. The use of one or more of the existing laws in a way unforeseen and unintended at the outset.
- 2d. The assertion that certain facts do or do not exist, contrary to the truth of the matter.
- 3d. Fictions of relation.

Of the first class an obvious example exists in the conveyance by lease and release. The Statute of Uses (27 Hen. VIII. c. 10), whose *object* was the destruction of uses, enacted that henceforth a *cestui que use* should be seised of the same estate he had in the use. Conveyancers soon took advantage of this enactment, and proceeded to create equitable estates for a short term in a proposed grantee, which the statute as promptly transferred into an estate in possession. Being thus theoretically in possession, the *cestui* was enabled to take a common law release of the reversion of the grantor, and the fee was thus transferred without the necessity of actual entry, as was required before the statute.

Another neat example under the first class is afforded by the Roman law. In the Roman law the power of a father over his children was absolute, he might kill them or sell them for slaves; and such was its permanence that if a son, after having been sold by his father, was emancipated by his master, he fell again into the power of his father, which was suspended but not destroyed by the sale. In the early times of the Republic there was no way in which a young man could become free but by the death of his father, who could not release him by any act he could do. It was afterwards enacted by a law of the Twelve Tables that if a son was sold by his father three times, and was three times emancipated by his master, he should become free. A legal fiction sprang up. The natural desire of a father to benefit his son existed, and at first the law afforded no means to gratify it. At last a law whose *object* was to check the authority of unnatural parents is passed, and it is immediately, by collusive and fictitious sales,

made the means of effectuating the desire, though not within its purview at all.¹

The second class comprises a very large number of fictions which, while possessing little importance as affecting the actual development of the law, have, from their bald falsity, attained to a distinction beyond their desert. While their object was usually to effect some reform in procedure, as in the action of ejectment; to extend the jurisdiction of the courts to matters not theoretically cognizable, as in the writ of *Latitat* or *Quo minus*; or to provide a place in the old classification for a new right, as in the fictitious promise in actions upon the common counts, — they were seized upon by those who did not understand their significance as affording a good point of attack. Such fictions have usually the great demerit of contradicting upon their face the common knowledge of mankind, while the ends for which they are invented are not of such an important nature as to make it quite clear in every case that the end justifies the means. Upon the other hand, it may be said of these devices that, saving the discredit which their apparent falsity brings upon the law, they are usually harmless and effective instruments.

The fictitious promise mentioned above is worthy of a few special words. It is one in a class to which may be assigned most of the fictions of relation. As the law develops and the process of refinement goes on, new rights are conferred and new classifications become necessary. There is no place in the old law for the new idea. Perhaps the plain way to confer the new rights would have been to say that certain acts should be followed by certain consequences, enumerating the acts at length, and the consequences also. There were certain difficulties in such a method, and the development of the common law in other ways suggested and made easy the short cut which was actually taken. Where upon the happening of an event a certain legal effect was desired, the occurrence of another event from which the consequence wished for would follow was feigned. For example, to classify a thing as a contract indicates at once certain legal consequences. Where upon certain transactions it is desirable that the parties should have to some extent rights and liabilities as upon a contract, although there was no mutual intention to contract, the end is reached promptly by saying that a contract is presumed, and permitting the promise to

¹ 2 Quar. L. J. 312.

be stated. The law of agency is full of these bits of legal terminology. A curious instance of the application of this principle is to be found in a common statute. The common law has defined the meaning of the word *perjury*, and to anything coming within the definition certain legal consequences are attached. When it became necessary to make those who falsely affirmed punishable, instead of creating a new offence and defining its punishment it was found more sure and easy to refer it to the already existing class, with its well-developed law, and so it is generally enacted "that every person falsely making a solemn affirmation *shall be deemed* to have committed perjury."

Fictions of relation, the third class in the classification attempted, have made themselves a part of the law. The discussion is not open as to their general utility, or whether they have justified their being, or outlived their usefulness. The doctrine of relation has become a part of the legal instinct of every common lawyer. It pervades every branch of the law, and to destroy it would necessitate the recasting of the entire body.

Fictions of relation have been divided into four kinds:¹ —

1st. Where the act of one person is taken to be the act of another.

Example: The act or possession of the servant equivalent to the act or possession of the master; felonious act done by one person in the presence of others, aiding and abetting him, the act of all.

2d. Where an act done by or to one thing is taken by relation, as done by or to another.

Example: Possession of land transferred by livery of seisin, or a mortgage of land created by delivery of the title-deeds.

3d. Relations of place.

Example: Contract made at sea, by a fiction of relation held to be at the Royal Exchange.

4th. Fictions as to time.

Example: Feoffment, with livery of seisin: subsequent attornment relates back. Title of the administrator relates back to the death of the intestate. Ratification by a principal of a previous act of his agent makes it good by relation.

Perhaps the part that the fictitious principle has played in the development of the common law, the invaluable assistance rendered in overcoming its rigidity at certain periods, in evading bad

¹ Best, Evidence, 313.

laws, amending defective ones, and rendering it possible to make law when it was necessary, cannot be better shown than by a slight sketch of some one branch; and for this purpose of concrete illustration some of the different stages in the development of the law of real property have been selected.

II.

The original grant by the feudal lords to their retainers, after the Conquest, seems to have been for life only, and was unalienable without the consent of the lord. From a very natural desire upon one side, and probably from lack of objection upon the other, these estates were soon changed into estates descendible to the lineal heirs male of the first donee. From this first breach in the feudal system, which came about by mutual consent, as it were, it is desired to note the successive means by which further concessions were gradually obtained for the tenant class, until the long battle between the nobles upon the one hand, and the judges, formulating the wants of the people, upon the other, ended in that complete dominion which every owner of land to-day exercises as of course.

The descent of the land to the lineal heirs of the tenant having grown into a recognized right, the first step taken by the courts was to extend it to collateral heirs by a *presumption* that all who could claim collaterally were of the blood of the first donee. This assumption of certain facts for true, without regard to the real truth of the matter, had the effect of legislating the lord's reversionary interest practically out of existence. The right of the heirs general of the tenant to the lands after his death having in this manner been acquired, the right to alienate in the life of the vassal was next sought; and while it was held to be impossible for a feudatory to alienate his feud, a *distinction* was soon taken between alienating the *tenure* itself and alienating the *lands*.

By these "presumptions" and "distinctions," the tenant found himself in possession of the principal of those rights which are to-day inseparable from ownership of land, — the right to transmit it to his heirs, lineal and collateral; and the right, to a certain extent, of alienating it in his lifetime.

The means adopted by the lords to combat the extension by the courts of the rights of the tenants was the invention of the estate afterwards known as a *conditional fee*. This was a grant,

not to A and his heirs generally, but to A and some particular class of heirs; as, for example, to A and his heirs by his wife X. The judges, pursuing their policy, proceeded to *construe* these gifts in a very liberal manner; they had recourse to an ingenious device taken from the nature of a condition. It is a maxim of the common law that when a condition is once performed, it is entirely gone, and the thing to which it is annexed becomes absolute. Upon the construction of the grant as a grant upon condition, they decided that as soon as issue was born answering the requirement of the grant, the estate of the grantee was absolute.

The construction put by the judges upon these grants made by the lords, as gifts upon condition, directly contravened the purposes for which they were created; and the barons soon made a more successful attempt to carry out their policy, in a manner which shows clearly their power over the machinery of direct legislation, and the impossibility of attempting through that means to meet the wants of the growing society. In 1285 the celebrated Statute *De Donis*¹ was passed, which provided that upon such a gift the donee should "have no power to aliene the land so given, but that it shall remain unto the issue of them to whom it was given after their death, or shall revert to the giver and his heirs if issue fail."

This destroyed all power of alienation of lands granted in such a way, and cut down the fee to narrow limits. The evils of such an enactment are obvious. Redress through the parliament of barons was impossible. It is common history that in every successive parliament, from Edward I. to Edward IV., a period of nearly two hundred years, bills were introduced to repeal the statute, and invariably rejected. The courts had recourse to various shifts, at first to mitigate the evil effects of the statute, and finally to neutralize its objectionable features.

The application of the doctrines of warranty and collateral warranty were the first steps taken. At common law the warranty of any ancestor bound the heir to render equally valuable lands to a grantee of the ancestor, *even without lands descending*.² A statute,³ nine years before the Statute *De Donis*, had changed

¹ 13 Ed. I. c. 1.

² It should be observed that the so-called sales of those days were in most cases merely perpetual leases by the grantor and his heirs to the grantee and his heirs. As the rent or services reserved came to the heir, the injustice of holding him bound without lands descending from the warranting ancestor was therefore more apparent than real.

³ 4 Ed. I. c. 6 (1276).

this by providing that where no tenure was created by a gift (and consequently no services as incident could be reserved), the warranty did not bind the heir. The judges took it that the Statute *De Donis* had not affected the law of warranty, and held, therefore, that the heir in tail was bound by a warranty of the tenant in tail as far as he took other lands to answer. This, of course, was only a slight relief, for this lineal warranty was not effective unless the tenant in tail died seised of an estate in fee. The statute mentioned above,¹ requiring the descent of assets to bind an heir, had reference only to lineal warranties, probably because no trouble had been experienced from the warranting of collateral ancestors. The judges, therefore, assumed that other warranties remained as before, that is, that the descent of assets was not essential to bind the heir; therefore by getting a collateral ancestor, whose heir the issue in tail would be, to concur in the alienation of the entailed estate, the Statute *De Donis* was successfully evaded.

Whether such a rule be regarded as just or not, as applied to the barring of estates in fee tail, depends upon the point of view from which the matter is regarded.² From that of the barons or of the heir in tail, it might be considered hard. From every other point of view it seems everything that could be desired. The effect of the application of this doctrine of collateral warranty upon the heir, in those cases where the relationships rendered it possible, was, that he was placed in exactly the same position he was in before the statute and is in to-day. The doctrine of collateral warranty is a fine example of the use by the judges of a practically obsolete bit of law for a purpose altogether different from its original one. The doctrine itself would doubtless have been specifically included in the statute of 4 Edward I. if it had been practically injurious enough to make it worth while. Though grossly unjust, it escaped, for this reason, to serve the judges later as an instrument for effecting a very useful and necessary end.

After the Statute of *Quia Emptores* (1290), which gave tenants in fee a general license to aliene, the alienee to hold of the original grantor and not of the tenant, the only restraint left on alienation by a tenant in fee was the necessity of the happening of the condition precedent, — the birth of the heir. In the time of Edward II. the judges in a case³ laid down a rule which removed this last

¹ 4 Ed. I. c. 6.

² See *Russ v. Alpaugh*, 118 Mass 372.

³ Y. B. 18 Ed. II., fol. 577.

vestige of restraint. They held that "when the ancestor, by any gift or conveyance, takes an estate of freehold, and in the same gift or conveyance an estate is limited to his heirs in fee or in tail, in such case 'the heirs' are words of limitation, and not words of purchase." This is the rule now known as the rule in Shelley's Case.¹

The introduction of uses (about 1370), by ecclesiastics, with the object of avoiding the statutes of mortmain, was turned to account by the courts in conferring indirectly the power of alienation by will, lost at the time of the Conquest. The courts recognized the distinction between the *legal seisin* and the beneficial *use* as they formerly had between the *tenure* and the *land*. A tenant in fee by a conveyance in his lifetime to such uses as he should appoint by his will was given this great additional power.

To return to the Statute *De Donis* and its effect upon conditional fees. Its immediate effect was to make the land so given inalienable. The application of the doctrines of warranty and collateral warranty, where the relationships made it possible, gave some slight relief; and here matters rested for almost two centuries. The barons in parliament absolutely refused to repeal the statute; and but for the boldness of the judicial legislators, operating by way of a fiction, it is impossible to say how long the system of perpetual entails created by the statute might have continued, or what the final outcome might have been.

The fiction of the common recovery, to which Taltarum's Case gave the first judicial sanction, and which was in effect a judicial repeal of the principal enactment of the Statute *De Donis*, depends entirely upon a bold application of the doctrine of warranty. A common recovery is a judgment obtained in a collusive suit brought against the tenant of the freehold in consequence of a default made by a person vouched to warranty in such suit. The fiction consisted in this, that the person vouched to warranty was a man of straw (usually the crier of the court), who suffered judgment to go against him. The plaintiff recovered the lands of the defendant, who in turn had a judgment against the man of straw, that he render him lands of equal value. The demandant recovered an estate in fee simple which could be disposed of as might have been arranged.

"Such a piece of solemn juggling could not long have held its

¹ See 1 Harg. Law Tracts, 500.

ground, had it not been supported by its substantial benefit to the community; but as it was, the progress of events tended only to make that certain which at first was questionable."¹ The right to suffer a common recovery was soon considered as the inseparable incident of an estate tail, and every attempt to restrain this right was held void.²

It was by the aid of this fiction that during four hundred years the common law succeeded in rendering abortive every attempt that the ingenuity and interest of landowners could suggest to erect a system of perpetual entails, until at length the principle embodied in Taltarum's Case was fixed by an Act of Parliament. It is more than probable that this long delay in providing for the want by direct legislation was due to the effectiveness of the substitute; and this is perhaps one of the arguments that may fairly be urged against the use of such a fiction: that by supplying the need in one way it removes the pressure which would (it may be) compel the satisfaction of that need in another and perhaps better way.

III.

This slight account of the rise and progress of the right to that absolute dominion over land which is possessed to-day by every owner shows that the most important forward steps were achieved by the courts alone, and at a time when the object could not have been attained at all, had it been necessary to depend upon the legislative department.

The process by which the courts legislated the lands into the hands of the people, as we have seen, had several stages. After the right of lineal heirs to succeed their ancestor had been conceded, the first step taken was the *presumption* by which the inheritance was extended to collateral heirs, then the *distinction* between the tenure itself and the land, by which the law forbidding alienation without the consent of the lord was evaded; following this the curious *construction* put upon the so-called conditional fees which practically nullified the first attempt of the lords to return to first principles, while the doctrine of *collateral warranty* and the fictitious *common recovery* neutralized the second attempt. The application of the *distinction* between the legal seisin and the use of land, and the allowance of a devise of the latter, conferred the last essential power needed to give complete control.

¹ Wms. R. P. 45.

² Mary Portington's Case, 10 Rep. 36.

Of these means employed, probably only the last in point of time, the common recovery, would be admitted upon all hands to be a fiction at all. Many, perhaps, would consider a *presumption* — which is an assumption of the truth of a certain matter without regard to the actual fact — as having every element that goes to make up a fiction of a certain kind. The ordinary definitions would, however, exclude all the other steps in the process; and yet the finely drawn distinctions, the strained constructions, and the arbitrary application of inapplicable rules of law, when such an application would produce a desired result, — all this sort of thing seems to be based upon the same principle which underlies the more obvious fictions.

What is this principle? The definition of a legal fiction, already put forward, as “a device for attaining a desired legal consequence, or avoiding an undesired legal consequence,” besides the defect of vagueness peculiar to itself, has another which it possesses in common with other definitions. This other defect is its failure to note in any way the fact that fictions are not a genus of which the various kinds are species, but that the fictions themselves are but a species of a much larger class of legal devices, which have been rendered necessary by the *unacknowledged* character of the power of legislation exercised by the judges, which, as a necessary consequence, entailed a resort to this principle of fiction.¹ The principle might be exemplified in reasons unconsciously or consciously false, or at the other extreme by the statement of facts knowingly false; but the object in either case was the same, — to harmonize the new decision with the old law.

It may be said that decisions might and may be given without assigning reasons. If this were ever done, and the last judgment was in effect new law, it would be simply the doing openly what

¹ Upon this point Sir Henry Maine says, in his book on Ancient Law, p. 31, “The process by which this virtual legislation is effected is not so much insensible as unacknowledged. With respect to that great portion of our legal system which is enshrined in cases and recorded in law reports, we habitually employ a double language. . . . The judge assumes that no question is or can be raised which will call for the application of any principles but old ones . . . such as have long since been allowed; . . . yet the moment the judgment has been rendered and reported, we slide unconsciously or unavoidably into a new language. . . . We now admit that the decision *has* modified the law; the rules applicable . . . have been changed. . . . We do not admit that our tribunals legislate; we imply that they have never legislated; and yet we maintain that the rules of the English common law, with some assistance from the Court of Chancery and from Parliament, are co-extensive with the complicated interests of modern society.”

has always been done. The practice of assigning reasons simply compels the taking of short steps, or that the power exercised shall be conscious legislation; for no line of argument could pass far out of the straight way without the consciousness of the reasoner. To illustrate this, suppose a decision to be made which is exactly warranted by the existing law. This may be supported by reasons absolutely sound; reasons which may be projected indefinitely without varying a hair's breadth from the true line of the existing law. But suppose the decision, however slightly, to change the existing law. The change may be conscious or unconscious; but if there is a change, no reasons could be by possibility assigned for it which would not, if pushed far, show the deviation.

What seems to the writer to be the true definition of a legal fiction is this:—

A legal fiction is a device which attempts to conceal the fact that a judicial decision is not in harmony with the existing law. The only use and purpose, upon the last analysis, of any legal fiction is to nominally conceal this fact that the law has undergone a change at the hands of the judges.

Just where the line of definition should be drawn across this line of devices, upon one side of which they should be called *fictions*, is not important. Had usage confined the meaning of the word to such of these devices as fall under class 2, in which certain facts are alleged or denied, which, *if true*, would make the decision based upon them consistent with the old law, it would have been a logical division. Having gone beyond this, it is difficult to say just where the next stop should be made. The application of the Statute of Uses in the conveyance by lease and release, or the use made of the Roman law as to the sale of sons by their fathers, although unexpected consequences, were within the terms of the law. The doctrine of Collateral Warranty as used after the Statute *De Donis* was also but the application of existing law; and the latter, it would seem, is fictitious in the sense that the two former are. Both may be described as negative fictions, for the judges regularly in the exercise of their powers find no difficulty in going *contra* to the letter of a statute to give effect to its spirit, or refusing altogether to apply an inapplicable rule; and when they neglect to exercise this power in order to reach some desired result, they in effect adopt what is in spirit illegal. The power exercised in the case of some *distinctions* is a conscious furnishing of words to justify a

judicial decree. In the case of the distinction as to tenure, while it nominally left the tenancy subsisting, it was practically eviscerated. As between the original lords and tenants and the courts, it was an evasion; the avoidance of an obstacle by a figure of speech.

Considering legal fictions in this broad way, the question which forms the subject of this paper is answered at the outset. These things, it is clear, are as much a part of the law as the decisions of the courts or the enactments of the legislative body. Without such things the course of legal progress would have been blocked at every step.

The result of the matter may be summed up in few words: Those whose duty it was to administer and expound the existing law, having in theory no power to abrogate or alter it, have, when justice demanded it, avoided an undesirable result, or reached a desirable one, in spite of, or without assistance from, the existing law, and have given many reasons in the process to show that what they did was still in line, until presently the new departure received the ratification of general assent, and became in its turn a rule. They have gone farther still, and by divers subtle imaginings, distinctions, and constructions, have moulded the law yet more openly. When evidence failed, a presumption supplied its place; when a technical rule was found inapplicable to special circumstances, it was held so; when the end in view required it, the technicality could be regarded as compulsive; plaintiffs might, by sufferance of the courts, state palpable untruths, and defendants might not deny them; and from that fine line where a decision departing but little from the established law is made and supported by reasons which aim to show that there is no departure at all, through all the various gradations to the coarsest and most palpable fiction, the underlying principle and object is the same, — to conceal, at least nominally, the fact that the new decision is not in accord with the existing law.

It cannot be doubted that those manifestations of the fictitious principle of a more refined and therefore less obvious character which generally accompany an act of judicial legislation have been of vital service to the law in two ways: first, by making less noticeable both to the world and to the judges themselves (and therefore more easy) the legislation that is being accomplished; and secondly, by serving as a brake upon this indirect law-making power: for the reasons assigned must not, under ordinary circumstances, be too plainly bad. It may be doubted whether the coarser

manifestations of the fictitious principle — the common fictions — have upon a balance of profit and loss shown a margin upon the right side. It can reasonably be said that the mere inconveniences generally avoided by their use might well have been endured until the legislative branch in its dignified progress provided a remedy. The law would thus have been spared some confusion and much not really merited abuse. But even if the use of fictions, using that word in its narrower sense, has proved detrimental to the development of the law, which does not appear, we cannot forget that they are the product and a part of a principle which has been essential to that development. If they are regarded as an abuse, still we cannot fairly debit them with the evil they have done without regarding the good which has flowed from that of which they are a necessary consequence; for some excess must be regarded as a necessary consequence of any great power.

It is certain that every one of these coarse fictions had some object, and the fact that it continued in use is proof that this object was at least partially attained. It is undeniable that certain of them proved of enormous service. Whether in any particular instance the net result of gain was sufficient to justify the introduction into the law of another anomalous thing might be a question; but to the writer, at any rate, it seems clear that the common law is much indebted to fictions, considered as a whole, for its rapid development and ability to follow closely the wants of men. Apart from the objection, upon moral grounds, that fictions are falsehoods, there have been but two other objections suggested which are entitled to consideration; and unless these appear to the reader so conclusive as to quite overbear the various suggestions which have heretofore been put forward, it would seem that the result should be a judgment for the fictions.

The objection most commonly urged against the use of legal fictions is that they usurp the legislative power. Admitting that the charge is true, one may well ask, What of it? Had the English people at various periods of their national life, and indeed through all periods, been obliged to depend entirely upon the formally authorized source of legislation, not England alone, but the world at large, would have been losers.

The second objection is well stated by Sir Henry Maine in his chapter upon Legal Fictions.¹ He says: —

¹ *Anc. Law*, 27.

"It is unworthy of us to effect an admittedly beneficial object by so rude a device as a legal fiction. [And he adds:] I cannot admit any anomaly to be innocent which makes the law either more difficult to understand or harder to arrange in harmonious order. . . . Legal fictions are the greatest of obstacles to symmetrical classification. The rule of law remains sticking in the system, but it is a mere shell. . . . Should [it] be classed in its true or in its apparent place?"

To the writer it appears that both of these objections are in a way to lose what force they originally possessed. They are based upon the ordinary narrow view of the object and cause of fictions, and apply only, therefore, to the coarse fiction of the common definition. The cruder manifestations of the fictitious principle die first. They have already almost ceased, in competition with the legislature, to make good their place. The direct way is now the short way; and these objections will therefore soon be directed to something which has ceased to exist. The real objection, it would seem, should be to the power of judicial legislation itself. The fictitious principle—which includes all manifestations—is incident to that. Such an objection, in the light of history, would be, of course, absurd.

While the power of judicial legislation exists and is exercised, though unacknowledged, its exercise must be, at least nominally, concealed. The last vestige of the fictitious principle will die out when the need to resort to it has ceased. When in the fulness of time the law has achieved its full stature; when every great principle has been not merely dotted out, but firmly outlined; when what is apparently conflicting has been harmonized, and what is left to do is but a process of amplification and refining,—fictions and the fictitious principle itself will cease to be used, because they will have ceased to be useful.

Oliver R. Mitchell.

AN ACTION AT LAW IN THE REIGN OF EDWARD III.: THE REPORT AND THE RECORD.

IT has been suggested that a paper on the relation of the reports of cases in the Year Books to the records of the same cases found among the Public Records might be of some interest to those readers who are giving attention to the history of law and of legal procedure. In the following pages an attempt is made to show, not in very great detail (for the details would be endless), but in a general way, in what manner the two sources of information differ, and why.

The report and the record were drawn up for two wholly different purposes. The report was intended for the use of the legal profession, including the judges. It was designed to show general principles of law, pleading, or practice. It was, of course, always a report of a particular case, but of one reported solely because it contained, or was supposed to contain, matter of general use. For this reason, the names of the parties and of places were frequently omitted or represented by letters chosen at hazard, or, if given at all, given most inaccurately. They were not the facts which the lawyer wished to know, and would not help to guide him in his pleading, except in cases in which an argument turned upon a description or a misdescription.

The record, on the other hand, was drawn up for the purpose of preserving an exact account of the proceedings in the particular case, *in perpetuam rei memoriam*, but only in the form allowed by the court. The report contains not only the pleadings eventually accepted, but often the reasons or arguments which preceded each, and the reasons or arguments for which other pleadings were disallowed. The record contains no arguments, and no pleadings but those actually allowed. Although it is possible to see in the report the pleadings which were admitted, they are not verbally identical with the corresponding entries on the roll. The pleadings in court were in French, but those entered upon the roll by the clerk or registrar were in Latin.

For these reasons, it frequently happens that the record in

Latin differs widely from the report in French, each containing matter which is absent from the other, each serving to illustrate the other, and, for historical purposes, neither being complete without the other. The report tells how the judges and counsel addressed each other, the courtesy which they showed or did not show to each other, their education according to the principles on which education was conducted in those days, and sometimes, though rarely, their powers of making a joke. The record helps towards none of these things; but, though wanting the life and action of the report, brings to light, in a calmer fashion, innumerable details without which a perfect picture of the social condition of the country cannot be drawn.

It will, perhaps, be asked, How can the record of any case in any term be identified as that which corresponds with any particular report of the same term, when the names of persons and places are not stated in the report itself? The task does, indeed, at first seem hopeless, and certainly presents considerable difficulties. It can nevertheless be accomplished, when the report is of any importance, though the search has to be made through a roll consisting of five or six hundred skins of parchment, closely written on both sides, without index, and with no guide except the name of the county in the margin, which, in the case supposed, is no guide at all.

The report, let us suppose, is a report of an action of formedon in the descender brought by A against B, in respect of lands in C, the donor having been D. It is, of course, necessary to know how an action of this kind is entered on the roll, the form in which the contents of the original writ are represented, and where the count begins. The roll is then examined until a formedon in the descender is found. This is compared with the admitted pleadings in the report, and it will usually be found either to agree so closely as to leave no reasonable doubt that the case is the same, or to differ so widely as to leave no reasonable doubt that it is not. In the latter event, further search must be made, and so on, from case to case, until the one sought is discovered.

As the different kinds of actions were numerous, the number of actions of any one kind on the roll of any particular term is necessarily limited. There were three kinds of actions of formedon alone (in the descender, in the reverter, and in the remainder), each entered in a different form according to its nature. In looking for any particular case, technical knowledge consequently

becomes its own reward, and abridges a labor which would otherwise be absolutely deterrent. The reward, too, is substantial, because not only do A, B, and D become persons with real names and additions, and not only does C become a known parish in an ascertained county, but the doubts left by corruptions or discrepancies in the manuscripts of the reports are removed, and the actual pleadings and the actual judgment are made clear beyond all possibility of question.

General principles are often most easily apprehended through particular instances. Let us now follow a case from beginning to end. A dispute arises in relation to land. The person who feels aggrieved, or his adviser, goes to the Chancery and sues out the original writ which is supposed to be applicable to the particular grievance. The Court of Common Pleas or Common Bench is the court which has jurisdiction in pleas of land, and the tenant (or party opposed to the demandant) is or ought to be summoned or warned by the sheriff, by due process, to appear. A comparatively simple case, which may serve our purpose, occurred in Michaelmas Term, 15 Edward III. (No. 71). It was a case of *cessavit*, — one in which a religious house, having had lands given to it on condition of performing certain services, had, as alleged, ceased to perform them for a period of two years. The demandant, in an action of this nature, hoped, by establishing his claim, to recover seisin of the lands in respect of which the services were due.

From the report of this case we learn that the tenant was the Abbot of Creak; but it does not tell us either who was the demandant, or where the lands were situated. In the record¹ it appears that the demandant was Margaret, late wife of John de Roos, and that the lands were in Gedney, in the county of Lincoln. In the report, the services by which the abbot was supposed to hold are said to be those of finding certain chaplains to sing divine services in her chapel (that is to say matins, mass, vespers, etc.), and of feeding certain poor persons, who were to receive daily certain loaves, etc., as well as "by a certain rent." No further details are given. In the count, however, as entered on the roll, there is far more information, and that of a character which illustrates the life of the people. The demandant counted that the abbot held of her by fealty and the service of three shillings per annum, and by the service of finding one chaplain who was to

¹ Placita de Banco, Mich. 15 Edward III., R^o. 457 d.

celebrate daily in the chapel of Saint Thomas the Martyr, situate in a certain messuage which was formerly John Dory's, divine services, which include not only matins, mass, and vespers, but certain prayers named, and others. The feeding of certain poor persons is seen to be the sustenance of five poor persons daily; that is to say, finding for each of them daily one loaf of the weight of fifty *solidi*, with porridge and ale, and finding a dish of meat, or fish, or other food, according to the day, between two of them, and half a dish for the fifth. Each of them was to have also a cloth tunic, suitable to his condition, every other year.

After the count, on the other hand, many matters appear in the report which are not on the roll. Counsel for the abbot, carefully guarding himself against any admission that he is tenant of the freehold or holds of the demandant, pleads in abatement of the count or declaration, which, he says, is not warranted either by statute or by common law. He complains that the demandant's counsel has included in the same count or declaration two different kinds of service, the cesser of which would produce two different effects. The tender of the arrears of the secular services might save the tenancy, whereas no tender could be made of the arrears of the spiritual services, the cesser of which would involve a forfeiture. It must, for instance, be obvious that the arrears of rent could be paid, whereas the omission of the daily performance of divine services in a chapel could never be made good in respect of days which had passed. Counsel for the demandant then says the exception taken applies to the action as commenced by a writ in the common form, because, if the count is not allowed, the particular action comes to an end. Counsel for the abbot practically accepts this argument, repeating that the count cannot be maintained on a common writ, and that the demandant ought to have had a special writ applicable to the particular case. Counsel for the demandant then argues by the analogy of such services as reapings and ploughings, for which a *cessavit* lies, even though arrears be tendered. Counsel for the abbot declines to discuss that point, but repeats that services of two different kinds are included in one declaration or count, whereas by the Statute of Gloucester (c. 4) one writ is given in respect of one kind of services, and by the Statute of Westminster the Second (c. 41) another writ is given in respect of the other kind. The chief justice here decides the point in favor of the demandant, saying that there cannot be two writs in this case, and that the plea is, in fact, to the action of *cessavit*.

Counsel for the abbot then pleads non-tenure: "We are not tenants of the freehold; ready, etc." Counsel for the demandant attempts to deprive him of this plea, on the ground that he has already pleaded to the action by his previous plea in abatement of the count. The court, however, holds otherwise. Counsel for the demandant then argues that this general plea of non-tenure is not good without a specific allegation that the tenant does not hold of the demandant: "In this writ of *cessavit*, which is taken on the cesser and on the tenancy, if he take his plea by way of disclaimer in the freehold, it is no answer unless he say that he does not hold of us, and so take his plea to the action, or unless he admit that he holds of us as mesne, but say that the writ does not lie because another is tenant of the freehold." Counsel for the abbot easily demolishes this argument, saying: "If I be not tenant of the freehold, whether I hold of you or not, the writ does not lie. Will you accept my averment that the abbot is not tenant of the freehold?" The report shows further only that issue was joined on this point.

The count, we may be sure, was not entered upon the roll until it had been held good by the court; but there was no necessity to enter the objections which were insufficient to abate it. In like manner, the plea would not have been entered until the court had allowed it. Thus, all matters occurring in the report between the accepted count and the accepted plea are omitted from the roll. As soon as the plea is reached, however, the roll again becomes the best, and, at the end, the only source of information. The reporter's work was done when he had shown, not only what were the pleadings on which disputes occurred, but how and on what grounds the disputes were settled.

According to the roll, the plea for the abbot was that he did not then hold the tenements, and did not hold them on the day of the purchase of the writ. The demandant replied that on the day of the purchase of the writ, — to wit, on the first day of May, — the abbot did hold; and issue was joined thereon to the country. The *postea* is also entered on the roll, showing how, at *nisi prius*, a jury found that the abbot did hold on the day of the purchase of the writ. Judgment was accordingly given for the demandant to recover seisin.

In this case the entry of the judgment upon the roll was of vital importance to the demandant, as she and her heirs acquired a new root of title thereby, — a title no longer to the services, but to the

land itself. This, however, did not concern the reporter, or the profession for the benefit of which he reported.

There were, however, cases in which the entry of certain matters upon the roll became of importance at stages previous to the entry of judgment. In Hilary Term, in the twelfth year of Edward III. (pages 373-75), an heir brought an action against his father's executors to recover a charter by which it appeared that the father had been enfeoffed of certain land in fee, and which he ought to have as the holder of the land. For the executors it was pleaded that the feoffment was upon condition (as shown by indenture, of which *profert* was made) that, whenever the feoffor or his heirs should pay the feoffee or his heirs or executors £40, it should be lawful for the feoffor or his heirs to re-enter upon the land, and the charter should be held as null. The feoffee in his will directed that the £40 (if paid) should be given to a prior. Judgment was therefore prayed whether the heir could have an action to recover the charter, which would lose its force if the £40 were paid to the executors. Judgment, however, was given that the charter should be delivered to the heir, because the executors could not deny that he was seised of the land as heir, and could not say that the money had been paid to them, or that they had an action to demand it. It would appear that, in the absence of any express direction to the contrary, the special plea on behalf of the executors would have been omitted from the roll, and that the declaration or count would have been followed by the simple entry that the executors could say nothing wherefore the charter should not be delivered. The counsel for the executors, however, prayed that the whole of his plea might be entered on the roll, as a protection to them against damages, in case the feoffor or his heirs should at any future time wish to pay the £40. To this the court consented, and the plea would consequently have been enrolled in its proper place.

In many cases it is apparent that the court directed, *ex officio*, what should be entered on the roll. Thus, in an oyer and terminer in Trinity Term, 12 Edward III. (pp. 615-617), where the felling of trees was alleged, the defendant claimed estovers, and on that ground avowed the carrying away of the trees, as not being against the peace, and prayed judgment whether any tort could be assigned thereon. It is not quite clear what was the plaintiff's reply, but the court decided that the issue should be that the defendant had with force and arms felled and carried away the trees, *absque hoc* that the defendant had estovers. The issue was accordingly so

entered on the roll, notwithstanding that this replication was not expressly pleaded.

It may, perhaps, be thought that the clerk or registrar had a difficult task to perform in entering the pleadings correctly on the roll, and that occasionally he failed. Failure did occur sometimes, and the roll had to be amended by order of the court. Sometimes also apparently the clerk (who was a very important officer, often consulted by the judges with regard to points of practice) discovered his own mistake, and corrected it by substituting an entirely new record of the case for one erroneously entered.

In the sixteenth year of Edward III.¹ there are two records of one and the same case.² The first is incomplete; the second is in a different form, and complete. The clerk, however, omitted to vacate the first by placing in the margin the usual words "*vacat quia alibi.*" The proceedings were on the judicial writ of *Quid juris clamat*, brought for the purpose of compelling tenants for life to attorn after a fine had been levied. The tenants, husband and wife, alleged that the wife's estate was an estate tail in virtue of a previous fine, and not a mere estate for life, as purported in the fine on which the *Quid juris clamat* was brought. Then arose a question whether the tenants could be admitted to aver this in opposition to the particular fine on which suit was taken. The court held that they could, and that the fact must be tried by a jury, adding that the whole matter should be entered on the roll, and that inquiry should be had as to the whole.

In making the first entry on the roll a mistake had occurred with regard to the process by which the tenants were required to appear, *Distringas* having been substituted for *Venire facias*. There is also an important difference between the first entry and the second as to the tenor of the earlier fine. In the first it is stated that the tenements had been granted and rendered to the wive and her previous husband and the heirs of their bodies, that they therefore claimed a fee tail in the person of the wife, and that they prayed judgment whether they ought to attorn in respect of such an estate. This was in accordance with the earlier part of the report; counsel for the tenants having distinctly used the words "fee tail," on the ground apparently that the wife was what would in later times have been called tenant in tail after possibility of issue extinct. In the second entry, however, the express claim

¹ H. 16 E. 3, No. 3.

² Placita de Banco, Hil. 16 Edward III. R^o. 64 and R^o. 181.

of a fee tail is omitted, and the following words are substituted: "So that if the same Robert and Margaret (the first husband and the wife) should die without heir of their bodies, the tenements should remain to the right heirs of Robert, and they say that Robert died without heirs issuing from his body and the body of Margaret, and they claim to have such an estate in the person of Margaret, and pray judgment whether they ought to attorn in respect of such an estate." This also is in accordance with the later part of the report, counsel having changed the form of pleading after argument.

We thus see how faithfully the clerks attempted to place the pleadings on the roll, and the difficulties with which they were beset. The second entry on the roll is, no doubt, a faithful representation of the matter which the court directed to be enrolled, as the first entry was of words which had, in the first instance, fallen from the mouth of counsel. The second entry shows the conclusion of the case, — the verdict for the demandants, to the effect that Margaret and her husband held only for life (as supposed by the fine on which proceedings were instituted), and judgment for the demandants to recover seisin. In the report these details are deferred to a later term.

It sometimes happens that there are widely different reports of the same case, one, perhaps, giving the names of the parties, and another not; one omitting matter which another includes; and one even absolutely at variance with another in relation to what was said, done, or decided. The record of the case is then invaluable, as it is the only authoritative statement of the pleadings accepted, and of the judgment. Sometimes, however, it is necessary to look even beyond the actual record of the case as enrolled in the court in which the action was brought. In difficult cases petitions were frequently made by the parties to the king in his council in his parliament, at various stages before judgment was reached. It then becomes expedient to consult the rolls of parliament if the cause is to be followed out from beginning to end, and the working of the prevailing system of justice to be understood.

The case of the Stauntons¹ affords an apt illustration. The names of the parties are omitted from one of the reports, but given in another. In one report, that in which the names are given, the conclusion is not reached. In the other, judgment is reached, and

¹ Y. B. M. 13 E. 3, No. 15.

even the fact that a writ of error was sued after judgment. The demandant was Geoffrey de Staunton, who brought a formedon in the descender against John de Staunton and Amy his wife, as appears in one of the reports and in the *Placita de Banco*.¹ Amy was admitted to defend, upon her husband's default, and, having vouched one Thomas de Cranthorne, waived that voucher, and vouched her own husband, on the following ground. A fine had been levied, by which John de Staunton acknowledged the tenements in dispute to be the right of Thomas de Cranthorne (as those which he had of John's gift) and by which Thomas rendered the same tenements to John and Amy and the heirs of John. Geoffrey, the demandant, tendered the averment that Thomas never had any estate in the tenements by John's gift. On behalf of Amy, the admissibility of this averment was denied, but the averment was entered on the roll with a protestation on behalf of Amy, that, if the court should be of opinion that it was admissible, she was ready to answer over.

This was a *dignus vindice nodus*, and Geoffrey presented a petition to the king in his council in his parliament. In the report it is stated only that the demandant "sued in parliament," that being a sufficient indication to the lawyers of the period of the course actually pursued. In his petition, the text of which is to be found among the rolls of parliament,² Geoffrey represented that the protestation as to Amy's readiness to answer over had been inserted by the clerks of the court by misprision, and prayed a decision as to whether the averment was admissible or not. It was agreed in the council in parliament that the averment was admissible, and that Amy could not be admitted to any further answer, as both parties had stood to judgment absolutely. Writs were accordingly sent to the justices of the Common Pleas, directing them to proceed without delay. The court, however, did not proceed, and another writ was sent to the same effect. Another series of arguments followed, in which Scrope and Willoughby, of the King's Bench, lent their assistance, but disagreed. These arguments, of course, appear only in the report. In the meantime no judgment was given, and Geoffrey, the demandant, presented another petition to the council in parliament, praying that the justices of the Common Pleas might be commanded to give judgment forthwith, or else bring their rolls, record, and process into parliament, so that judg-

¹ Mich. 13 Edward III. R^o. 107 d.

² 2 Rol. Parl., 124 b, as printed.

ment might be given one way or the other, without further delay. It was thereupon agreed by all in full parliament, and commanded by the prelates, earls, barons, and others of the parliament, "that the clerk of the parliament should go to the chief justice and other justices of the Common Bench, and require them to proceed to judgment without further adjournment or delay." In case the justices were unable to agree, they were to come into parliament, and the chief justice was to bring into parliament the rolls and the record of the plea.

Stonore, the chief justice, with the other justices, did bring the record into parliament. The chancellor, the treasurer, the justices of the King's Bench, as well as those of the Common Bench, the barons of the Exchequer, and others of the king's council were there present. The process and record were viewed and read, the point of law was decided as before, and direction was given that Geoffrey should recover his seisin against John and Amy.¹

Geoffrey's last petition and the whole of the proceedings following upon it are represented in the report by the few words following: "And afterwards the matter was again sent into Parliament, and there judgment was commanded for the demandant for the reason above."

Judgment was then given, as appears both by the report and by the Common Pleas roll, in accordance with the direction of the council in Parliament. Even in the Common Pleas roll, however, there is not the full account of the transaction which is given in the rolls of Parliament, the judgment being prefaced only by these few words: "And thereupon, after advice had as well of the prelates and magnates as of the justices and other of the council of the lord the king, there present in the full parliament last held."

It might have been supposed that the case was now at an end; but the demandant was almost as far as ever from obtaining seisin of the land. The judgment, though given by direction of Parliament, was technically a judgment of the Court of Common Pleas. From that court a writ of error lay to the Court of King's Bench, and a writ of error was accordingly sued. A full account of all the proceedings in error would be tedious, as (except in the fact that John and Amy now became plaintiffs in error, and that the assignments of error and pleadings thereupon took the place of the pleadings in the court below) precisely the same features present

¹ 2 Rol. Parl., 123, as printed.

themselves again. There are again reports in two distinct forms differing from the record¹ in a manner similar to that in which the record of the court below differs from the reports. There are petitions and the counter-petitions to the king in his council, in his parliament, directions from parliament to the justices to proceed, further delays, and further directions. In the end, after five years of litigation, when delay had reached its utmost limit, and when a peremptory order to the justices to proceed followed a last petition from Geoffrey, John and Amy failed to appear, and Geoffrey at length obtained execution of the original judgment.

This case, as well as innumerable others, will show how necessary it is to travel beyond the Year Books in order to understand them, and how intricate is the study of the records if conducted on scientific principles. Since the passing of the Act which abolished most of the real actions, of the Act for the abolition of fines and recoveries, and of the Uniformity of Process Act, in the reign of William IV., the old learning has progressively fallen into decay. Much of it, indeed, had been forgotten still earlier. The number of persons who have any acquaintance with the old forms of action and the old modes of proceeding is every day becoming less; and there is a growing tendency to look upon the public records of England as mere curiosities, or as a hunting-ground for the antiquary and genealogist in search of isolated facts. In like manner it is not uncommonly supposed that the cases in the Year Books can but rarely be of practical utility for the purposes of the lawyer, and that beyond the range of that practical utility they are useless.

In this paper the rolls only of parliament, of the King's Bench, and of the Common Bench have been mentioned, and only the relations of a portion of their contents. The subject of the relation of the various classes of public records to each other, it need hardly be said, is far too wide for discussion in a limited space, as indeed is the relation even of the records of the courts in general to the Year Books in every detail. Enough, however, it may be hoped, has now been said to show how very necessary is a knowledge, not merely of the contents of a particular class of records, but of the bearings of the different classes of records on each other, for a thorough comprehension of the reports.

¹ *Placita coram Rege*, Hilary, 15 Edward III. R^o. 41.

There is yet another aspect of the reports in the Year Books which has to be regarded. From the undoubted fact that the Year Books are not very intelligible without a proper use of the records relating to them, it is not to be inferred that the records will suffice for all purposes for which the Year Books could be used. In the first place, a record can never serve the purpose of a report, because, as already explained, each is drawn up with a different object. In the second place, the reports may be so treated as to render them the best guides in a search after the most valuable records. No one who knows, for instance, the bulk and the contents of the *Placita de Banco* would think of publishing the whole *in extenso*. On the other hand, however, no one who has not a knowledge of the reports and of their value, not only legal, but historical, could be trusted to make a selection from the rolls.

There are in the reports innumerable matters of interest, legal, historical, constitutional, and social, which have no counterpart in the rolls. In the rolls are the dry bones of the bare facts. In the reports are living men, dealing with the facts in their own language, in the spirit of their own age, in tones which reveal what manner of men they were. Thus, the last thing, perhaps, which might be expected to occur in a report rather than a record, is information relating to horticulture. Yet, in an action of waste,¹ where waste was alleged, *inter alia*, in respect of a whitethorn-tree, there occurs a curious illustration of the practice of grafting. Counsel for the defendant said this ought not to be adjudged waste, because whitethorn is underwood which cannot be the subject of waste in a garden. On the other side, it was replied that whitethorn is a tree upon which a graft may be made, and this was not denied.

We accordingly learn that the practice of grafting on the whitethorn was well known in the fourteenth century in England, and that fruit was already cultivated with some skill.

Judges and counsel must in those days have been good linguists. They were always ready to seize upon the least slip in the grammar of any Latin writ or other instrument in Latin. Their usual language in court was at this period French, and it is real living French, very superior to the law French of a subsequent period, when the language of the courts was English, and the language of

¹ H. 14 E. 3, No. 38.

the reports became a jargon. We see from their arguments exactly how French was spoken in every-day life. Some other dead languages have something analogous in the dramatic writings which have survived; but even a drama does not reproduce the living speech so exactly as a report of words actually spoken, and written down, more or less correctly, at the time, or immediately afterwards, by persons who had actually heard them. The earlier Year Books consequently afford materials for the study, not merely of the written, but also of the spoken language.

As might have been expected, where men of high education were speaking, it usually appears that the rules of courtesy were observed among them. They lived, however, in a comparatively rude age, and in the midst of rough surroundings. Thus we find sometimes a directness of expression which would hardly occur in modern times. In one case,¹ the justices say in so many words that a previous decision had been obtained by favor. In another case,² one of the judges is openly blamed by his fellows for too hastily deciding that a writ was good, though they admitted that the decision was correct. The same case illustrates the grammatical training which the lawyers received in the days of the schoolmen, and their readiness to dispute as to the meaning of a word. An action of waste was brought by the Earl of Hereford against Alice, who held in dower by endowment of the previous earl. At the end of the writ of waste occurred the words "*ad exheredationem praedicti comitis*," the intention being to describe the living and plaintiff earl. Counsel for the defence argued that as both earls had been mentioned in the writ, the word *praedicti* did not determine with certainty to which of the two reference was made. Counsel for the plaintiff said the word must be understood to refer to the living earl, though it might be otherwise if one earl brought a writ against another earl. One of the judges then said: "If the words of the writ were '*ad exheredationem ipsius comitis*,' *ipsius* being a demonstrative pronoun, then the word would refer to the earl who is living, but *praedicti* refers to either indifferently." In the end, however, the writ was held good in spite of the quibble.

Judicial jokes are somewhat rare, and, when they occur, are apt to be of the grim and severe type. In Michaelmas Term in the eleventh year of Edward III. (p. 295), one of the judges introduced

¹ T. 12 E. 3, p. 603.

² E. 12 E. 3, pp. 443-5.

a little story more or less relevant to the matter in hand. A man, he said, once brought an assise before the justices at York, and the tenant pleaded that the plaintiff had been outlawed for felony. He had, in fact, been outlawed and subsequently pardoned, but had forgotten to bring his charter of pardon from the inn. He was arraigned instantly. As, however, the chancery was at York (with its records), he vouched the record of his charter of pardon in the chancery. "And," said the judge, "if the chancery had not been at York, he would have gone on his pilgrimage to Knaresmire." The point of the remark lies in the fact that Knaresmire was the place of execution.

Not the least valuable matter in the reports, as distinguished from the records, however, is that which shows how many propositions were accepted, without dispute, as settled law. For modern purposes there is quite as much to be gleaned from such passages as from the substantive decisions for which the Year Books are more often searched. Thus, in Trinity Term, 13 Edward III.¹ a question arose as to the sufficiency of a jury, it being alleged that when a peer of the realm was a party, it was his privilege that there should be a special jury, consisting partly of knights. The point was contested, but the privilege was affirmed by the judges. In this particular case, however, it was a bishop on whose behalf the privilege was claimed as being a peer of the realm. No one suggested that a bishop was not a peer of the realm. It was clearly admitted, as an indisputable fact, by counsel on both sides, and by the judges, that he was. So also in Easter Term in the same year,² it was stated by counsel that the Abbot of Ramsey held by barony, and was a peer of the realm. He did not obtain his object, which was to prevent the opposite party, who was plaintiff, having a delay or postponement known as a "day of grace." His case, however, was like those of other peers, mentioned in the books, who did not succeed on this point, and no one argued that the abbot was not a peer of the realm.

In later times it has been the opinion commonly received that a spiritual lord, as such, is not a peer of the realm; and the two cases last mentioned are consequently of very great interest and importance, though showing no express decision on the point. So, also, other subjects from time to time force themselves upon the attention of a student of the Year Books, and indicate how much

¹ No. 2, p. 291.

² No. 24, p. 223.

remains to be written with regard to the English constitution. It is not going beyond the bounds of truth to say that, setting aside battles and statecraft, the greater part of the history of England, as well as of its law, during many centuries in the life of the nation may be found in the Year Books and the corresponding records, which are their complement.

L. Owen Pike.

AN ASSIGNMENT IN INSOLVENCY, AND ITS EFFECT UPON PROPERTY AND PERSONS OUT OF THE STATE.

QUESTIONS of private international law, always interesting and always difficult, gain added interest and increased difficulty when they arise between States like the United States of America, which, though sovereign and independent, are bound together into a nation under a National Constitution.¹

Each citizen in each of the States owes allegiance to the Nation, and has certain rights which may be called his National rights. These National rights cannot rightfully be taken away or infringed upon even by the State of which he is a member. Each citizen, again, owes allegiance to his own State, and has certain rights which may be called his State rights. These rights, also, cannot rightfully be violated or diminished even by the National Government of the United States. It is the duty of the United States to protect its citizen in his National rights, even as against his own State; and it is the duty of the State to protect its citizen in his State rights, even as against the United States.²

In administering the laws of the several States relating to insolvency and insolvent debtors, a number of important questions of constitutional law and private international law have arisen, which in their larger aspect involve a consideration of the State rights as compared with the National rights of the citizens of the several States.

It is provided by the United States Constitution, Art. IV., sec. 2, that the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States. And by the Fourteenth Amendment it is further provided that "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor deny to any person within its jurisdiction the equal protection of the laws."

In *Ex parte Virginia*,³ it is said of this provision: "It opens the

¹ See Rorer on Interstate Law, 2d ed., chap. iii. pp. 11-13.

² See *United States v. Cruikshank*, 92 U. S. 542 (1875).

³ 100 U. S. 339, 367 (1879).

courts of the country to every one on the same terms for the security of his person and property; . . . it allows no impediments to the acquisition of property . . . to which all are not subjected."

In *Hayes v. Missouri*¹ it is said: "Class legislation, discriminating against some and favoring others, is prohibited."

In *McPherson v. Blacker*² it is held that these constitutional provisions were designed to prevent any person or class of persons from being singled out as a special subject for discriminating or hostile legislation.

In considering the subject of the present article, an assignment in insolvency and its effect upon persons and property out of the State, we shall have occasion to note and comment upon several kinds of favoritism or discrimination practised by some of the courts, by reason of the residence or non-residence of the particular creditors seeking to acquire property by means of attachment.

The effect of an assignment in insolvency on assets abroad was to some extent considered in a very able article by Samuel Williston, Esq., in the *HARVARD LAW REVIEW*, vol. v. pp. 211-221, and it was there pointed out that according to the law in England all the personal property of the bankrupt debtor, wherever situated, passes to the assignee in bankruptcy, whether appointed in England or elsewhere; that such property passes subject to any lien or attachments which may exist at the time the transfer takes effect; that it is held to be inequitable and unlawful for an English creditor to go abroad after the bankruptcy and attach and acquire property of the bankrupt which would otherwise come to the assignee for distribution; that it is further held in England to be unlawful for a creditor to keep what he has unlawfully acquired, so that the assignee of a bankrupt may either take measures by injunction to prevent an English creditor from proceeding with an attachment made abroad after the bankruptcy, or he may (if it is too late for an injunction), by an action for money had and received, compel the creditor to hand over the proceeds of the attachment. The above rules were all established in England at an early day, most of them prior to 1800, and have been adhered to with consistency to the present time.³

The principle or rule which is made the basis of the English

¹ 120 U. S. 68 (1886).

² 146 U. S. 39 (1892).

³ See Foote's *Private Internat. Jurisprudence*, 2d ed., pp. 302-308 (1890).

doctrine is that personal property follows the person of its owner, and is governed, as to its transfer, by the law of his domicile.

In the United States the courts from the outset usually refused to follow this doctrine, and it was early held that personal property of an English bankrupt in the United States might be held by attachment to satisfy the claims of American creditors. The chief reason for departing from the English doctrine seems to have been the hardship there was in compelling American creditors to go to England to share in the winding up of their debtors' affairs. The means of transportation between England and the United States were poor; the relations between the two countries had not been friendly; and so the courts very naturally refused to recognize the fiction that personal property has no locus, and decided that the laws of England had no extra-territorial force and should not as a matter of comity be given effect to the detriment of American creditors, who, presumably, had given credit to the bankrupt on the strength of his personal property located in the United States.¹

The doctrine thus established in the United States in regard to the property of English bankrupts was very naturally adopted when similar questions arose in regard to the property of an insolvent debtor domiciled in a different State, and it soon became well-established law that for purposes of attachment, personal property has a locus, and that assignments in insolvency under State laws have no extra-territorial effect, at least as against attachments made by citizens of the State where the property is located. If the attachment is made by a creditor from the State where the debtor is domiciled, and the insolvency proceedings are had, a distinction is made by some courts, and such a creditor is denied the rights which are accorded the citizens of the State where the property is situated.

If the attachment is made by a creditor from some State other than that where the insolvency proceedings are had, and other than that where the property is located, a still further distinction is made by some courts, and such a creditor also is denied the rights accorded to citizens of the State where the property is located.

I shall attempt now to trace briefly the rise of these distinctions,

¹ *Burk et al. v. M'Clain*, 1 Harris & McHenry (Md.), 236 (1766); *Jones et al. v. Blanchard et al.*, cited in 1 Mills Const. Ct. Rep. (S. C.), 284 (1785); *Taylor v. Geary*, Kirby (Conn.), 313 (1787); *Wallace v. Patterson*, 2 Harris & McHenry (Md.), 463 (1790); *M'Neil v. Colquhoun*, 2 Hayward (N. C.), 24 (1797); *Harrison v. Sterry*, 5 Cranch (U. S.), 289 (1809).

and to show how they stand at the present time in view of the existing constitutional provisions above alluded to.

Maryland. — In the case already cited of *Burk v. M'Clain*, decided in Maryland in 1766, the attaching creditor was an Englishman. The distinction was taken that, being an Englishman, he could conveniently enough prove his claim at home under the English bankruptcy proceedings, and it was held that there was no occasion to depart from the English doctrine. The court took pains to state, however, that if the creditor had been a resident of Maryland the rule would have been otherwise.

Connecticut. — In the case of *Taylor v. Geary*,¹ the court made no distinction between domestic and foreign creditors, and held that English as well as American creditors were entitled to attach property in Connecticut, in spite of the English bankruptcy.

This doctrine of equality thus early announced in Connecticut was affirmed and extended in the same State in the year 1876 in the leading case of *Paine v. Lester*.² The attaching creditor was a citizen of Rhode Island, the defendant a citizen of Pennsylvania, and the trustee or garnishee a resident of Connecticut. The attachment was held superior to a prior statutory assignment in insolvency in Pennsylvania. The grounds of the decision are that the laws of a State or country have no legal effect beyond the limits of its territory, but are given effect wholly as a matter of comity. This comity will usually be extended if there is no interest of citizens of the State of Connecticut, or of a sister State, who are seeking to avail themselves of the protection of the laws of Connecticut, which will be injuriously affected by the exercise of such comity. The court use the following language: "The citizens of all our sister States have, by the Constitution of the United States, the same privileges with our own citizens; and any one of them who has availed himself of the legal remedies furnished by our laws to secure payment of a debt due him, has the same claim to the assistance of our courts that one of our own citizens would have."

Pennsylvania. — In Pennsylvania, in the case of *Milne v. Moreton*,³ it was held that an English bankruptcy assignment had no effect in Pennsylvania against a subsequent attachment by an American creditor. The attachment was by a citizen of New York. The

¹ Kirby (Conn.), 313 (1787).

³ 6 Binney, 353 (1814).

² 44 Conn. 196 (1876).

opinion of the court seems to be that all American creditors, whether resident of Pennsylvania or of other States, stand on an equal footing. English creditors, as it is briefly intimated, would be held bound by the English assignment. The following remark by Chief Justice Tilghman, on page 361, as to the locus of personal property, is worth quoting: "In one sense personal property has locality; that is to say, if tangible, it has a place in which it is situated, and if invisible (consisting of debts) it may be said to be in the place where the debtor resides."

The distinction suggested in this case, that an English creditor might be held bound by an English bankruptcy assignment, was adopted and made law in the case of *Mulliken v. Aughinbaugh*,¹ which was the case of an attachment in Pennsylvania by a Maryland creditor of personal property which had belonged to his insolvent debtor, who was also a resident of Maryland. The court say: "But the case at bar is free of difficulty on this or any other head, the attaching creditor being personally bound by the laws of Maryland, and consequently disabled from gaining an advantage inconsistent with those laws by any proceedings here."

The case of *Bagby v. Atlantic, Miss. & Ohio R. R. Co.*² is to the same effect.

The Pennsylvania court, it is said, will protect citizens of Pennsylvania who are not bound by the laws of the place of assignment, but will not aid citizens of that State to act in violation of the law which is binding on them. The constitutional question is noticed briefly, and the case is held not to be affected by the provision that "the citizens of each State shall be entitled to all privileges and immunities of citizens of the several States."³

In the case of *Long v. Gridwood*,⁴ the Pennsylvania court reaffirm the same doctrine, and extend it to the case of all non-resident attaching creditors, whether residents of the place of assignment or elsewhere. "It matters not" (the court say) "whether the attaching creditor is a resident of the State in which the assignment is made, or of another State foreign to this jurisdiction. If he is a citizen of a foreign State, he can receive no aid here in an effort to obtain a preference in disregard of the assignment. . . . This rule rests on comity between the States, and the only excep-

¹ 1 Pa. 117 (1829).

² 86 Pa. St. 291 (1878).

³ See *Bacon v. Horne*, 123 Pa. St. 452 (1888), to same effect.

⁴ 150 Pa. St. 413, 419 (1892).

tion to it is in favor of our own citizens." Citizens of the United States outside of Pennsylvania, as it would seem, stand a poor chance in the courts of Pennsylvania in the acquisition of property by attachment in competition with citizens of that State. The courts of Pennsylvania are apparently not open to all citizens of the United States on the same terms, and a class of persons, to wit, citizens of Pennsylvania, are singled out as a special subject for favorable discrimination. We shall speak of this again further on.

Massachusetts. — In Massachusetts similar results have been reached both in the case of insolvency assignments¹ and also in the case of what are called common law or voluntary assignments; and it is virtually held that a non-resident creditor carries the law of his own State with him and is bound by it wherever he goes; and such a creditor is thereby placed on a different footing from the citizens of the State in which he sues.² The latest Massachusetts case on this point is that of *Frank v. Bobbitt*.³ The court here deliberately announce that citizens of other States will not be granted equal rights with citizens of Massachusetts in the matter of acquiring property by means of attachment. The case was that of a common law assignment with preferences made in North Carolina by a debtor resident there to assignees resident there but not assented to by creditors in such a way as to make it good in Massachusetts, according to the Massachusetts law. A suit was brought in Massachusetts, and an attachment was made by a citizen and resident of Maryland. *Held*, that the assignment, although not valid as against citizens of Massachusetts, should be held valid as against a citizen of Maryland. The attention of the court was not especially called to the constitutional questions involved, no notice was taken of such questions in the opinion, and the case is not indexed as deciding any constitutional point. The converse of this rule — viz., The superior rights of attaching creditors who are citizens of Massachusetts — has been repeatedly recognized and enforced.⁴

In *Cunningham v. Butler*⁵ it is stated, in substance, that a State may properly protect its own citizens from the effect of a foreign assignment, but should not protect creditors who are citizens of

¹ See *Blake v. Williams*, 6 Pick. 286 (1828).

² See *Burlock v. Taylor*, 16 Pick. 335 (1835); *Whipple v. Thayer*, 16 Pick. 25 (1834).

³ 155 Mass. 112 (1891).

⁴ See *Taylor v. Columbian Insurance Co.*, 14 Allen, 354 (1867); *Faulkner v. Hyman*, 142 Mass. 53 (1886).

⁵ 142 Mass. 47 (1886).

the State where the assignment is made, nor creditors who are citizens of other States.

The following summary of some of the results reached in Massachusetts may prove of interest: —

1. It is unlawful for a creditor who is a citizen of Massachusetts to go out of the State shortly prior to the failure of his debtor, and by attachment secure a lien or claim on property which would otherwise come to the assignee, and such a creditor will be enjoined.¹

2. It is lawful under the United States Constitution for the Massachusetts court to enjoin such a creditor.²

3. It is lawful for such a creditor to sell his claim with the inchoate lien gained by such an unlawful attachment, and keep the proceeds of the sale to his own use.³

4. It is lawful for such a creditor, if by means of such an unlawful attachment out of the State, followed by judgment and execution, he has secured payment of his debt in full, to keep the money so collected for his own use.⁴

N. B. — In England, where it is unlawful for a creditor to attach property abroad, it is unlawful for him to keep the proceeds of the attachment.⁵

5. It is lawful for a Massachusetts creditor who has collected part of his debt by means of an unlawful attachment out of the State to prove the balance of his debt and take a dividend thereon.⁶

6. If a Massachusetts creditor who has made an unlawful attachment abroad is in danger of being enjoined, he may protect himself either by selling his claim or by procuring some non-resident creditor to make a second attachment.⁷

7. It is lawful for a Massachusetts creditor to attach *real estate* abroad shortly prior to the failure, even though the insolvency statute in terms embraces such real estate and gives the assignee the right to compel the debtor to execute a deed confirming his title to the same.⁸

¹ See *Dehon v. Foster*, 4 Allen, 545 (1862).

² See *Cole v. Cunningham*, 133 U. S. 107 (1889).

³ See *Proctor v. National Bank of Republic*, 152 Mass. 223 (1893).

⁴ See *Lawrence v. Batcheller*, 131 Mass. 504 (1881).

⁵ See *Hunter v. Potts*, 4 T. R. 182 (1791).

⁶ See *Batcheller v. National Bank of Republic*, 157 Mass. 33 (1892).

⁷ See *Chipman v. Manufacturers National Bank*, 156 Mass. 147 (1892).

⁸ *Ibid.*

N. B. — In England the courts have lately held that real estate in the colonies passes under English bankruptcy assignments.¹

8. It is lawful, as it would seem, for a Massachusetts insolvent debtor to convey by way of preference real estate situated in another State.²

Maine. — In Maine, the Massachusetts doctrines largely prevail.³

In *South Boston Iron Co. v. Boston Locomotive Works*,⁴ we find the following *dictum*: —

“Citizens of other States are entitled to bring suit in our courts. Const. U. S., Art. IV. Sec. 2. Being so entitled, they have all the rights of our own citizens in securing their claims by attachment or by arrest of the party indebted. . . . These provisions are the positive law of this State, and courts have no power to dispense with them by the rules of comity. . . . There cannot be two modes of procedure, one for the citizen, and a different one for the stranger within our gates.”

After this *dictum* it was fair to suppose that the Maine court was quite certain to adopt what we may call the Connecticut rule of the equal rights of citizens of the United States; but the weight of authority in favor of discrimination was supposed to be too strong, and in the case of *Chaffee v. Fourth National Bank*⁵ we find the following announced as the true doctrine: —

“Comity between States is not thus to be extended to the prejudice of our own citizens. . . . We think it clearly implies that while a foreign assignment will not be permitted to defeat the attachment of a domestic creditor, it will have that effect upon foreign creditors. . . . It is the supposed duty of every government to protect its own citizens, — a duty which it does not owe to foreigners. . . . There is certainly force in the objection that such a discrimination is in conflict with that provision of the Federal Constitution which declares that the citizens of each State shall be entitled to all privileges and immunities of citizens of the several States. But there are many cases in which such a discrimination has been sustained, and we are aware of none in which this objection has prevailed.”

¹ See *Callender v. Colonial Sec'y of Lagos and Davies* (1891), App. Cas. 460; see also *Eddy v. Winchester*, 60 N. H. 63 (1880), where the New Hampshire court assumes that the doctrine of *Dehon v. Foster* applies to real as well as personal property.

² See *Chipman v. Peabody*, 34 N. E. 563 (Mass. 1893); see also *Schindelholz v. Cullum*, 55 Fed. Rep. 885 (1893).

³ See *Felch v. Bugbee*, 48 Me. 9, 18 (1859); *Owen v. Roberts*, 81 Me. 439 (1889).

⁴ 51 Me. 585 (1862).

⁵ 71 Me. 514, 524 (1880).

New Hampshire. — In New Hampshire the early doctrine was similar to that adopted in Pennsylvania, Maine, and Massachusetts.¹ In *Kidder v. Tufts*,² the court say: —

“For the purpose of making an attachment upon property of the defendant here, the plaintiffs may properly be considered subjects of our State government so long as they submit to our jurisdiction and claim the protection of our laws, and we do no more in allowing them the advantages of their superior diligence than to admit them to the full enjoyment of that privilege so clearly expressed in the Constitution of the United States ‘that the citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States.’ ”

In the very late case of *Sturtevant v. Armsby Co.*,³ the New Hampshire court fully adopted the Connecticut rule. In this case the debtor resided in Massachusetts and went into insolvency in Massachusetts. He had property in New Hampshire which was attached after the insolvency by a creditor who was a resident of Illinois. The assignee from Massachusetts sued in equity to enjoin the attachment. *Held*, that under the Fourteenth Amendment to the United States Constitution the resident of Illinois was entitled to protection under the laws of New Hampshire the same as citizens of New Hampshire. It is not certain, the court say, “that the same result would not have been reached if the attaching creditors were residents of the State where the assignment was made. The defendants are not foreigners. They are citizens of Illinois, and as such when in this jurisdiction are entitled, under the Fourteenth Amendment of the Federal Constitution, to the equal protection of our laws. . . . They are now in this jurisdiction. They are here lawfully in court as suitors, and in that character entitled to all the rights the law gives to our own citizens.”

New York. — In New York this query of the New Hampshire court as to the rights of creditors who are citizens of the place of assignment has been answered, as we shall see, in the affirmative; and it has been decided and affirmed that in New York, at least, the equal rights of citizens of the United States are recognized and protected, regardless of from what State they come. At the outset the New York court in the case of *Holmes v. Remsen*⁴ endeavor-

¹ See *Saunders v. Williams*, 5 N. H. 213 (1830); see *Sanderson v. Bradford*, 10 N. H. 260 (1839). See *Hoag v. Hunt*, 21 N. H. 106 (1850). In this case the constitutional question was raised by counsel, but without effect.

² 48 N. H. 121, 125 (1868).

³ 23 Atl. Rep. 368 (1891).

⁴ 4 John. Ch. 460 (1820).

ored to adopt and maintain the English doctrine that personal property follows the person of the owner, and is transferred everywhere by a bankruptcy assignment made at the place of his domicile.

But the weight of authority in America against this doctrine was too strong, and the New York court soon fell into line with the courts of the other States in holding that an insolvency assignment has no extra-territorial effect as against attaching creditors.¹

In the case of *Johnson v. Hunt*,² Judge Cowen, after noticing certain cases which hold that an insolvent assignment is to be held good as against citizens of the State where it is made, says: "Keeping our eye steadily upon the true principle, I apprehend we shall find that in whatever way the party honestly acquires title to the bankrupt's property situated in a foreign state, his citizenship has nothing to do with the question."

*Hibernia Bank v. Mechanics, etc., Bank*³ was the case of an attachment in New York by a Louisiana creditor of assets which were claimed by a Louisiana syndic or assignee in insolvency. It was held that the court would accord the same rights to citizens of the State where the insolvency proceedings are had as it would to citizens of its own and of other States.

See also same case on appeal, *Hibernia National Bank v. Lacombe*,⁴ where the court say: "The plaintiff, as we have seen, although a foreign creditor, is rightfully in our courts pursuing a remedy given by our statutes. It may enforce that remedy to the same extent and in the same manner and with the same priority as a citizen. Any other construction would make the permission of the statute a form without benefit; a formality and not matter of substance; a mere delusion. Once properly in court and accepted as a suitor, neither the law nor court administering the law will admit any distinction between the citizen of its own State and that of another. Before the law and in its tribunals there can be no preference of one over the other."

In a case entitled *In re Waite*,⁵ the new doctrine is well and briefly stated to be that on grounds of comity the titles of foreign statutory assignees are recognized and enforced in New York; but

¹ See *Abraham v. Plestoro*, 3 Wend. 538 (1829); *Hoyt v. Thompson's Executor*, 19 N. Y. 207 (1839); *Guillander v. Howell*, 35 N. Y. 657 (1866); *Kelly v. Crapo*, 45 N. Y. 87 (1871).

² 23 Wend. 86 (1840).

³ 21 Hun, 166 (1880).

⁴ 84 N. Y. 367 (1881).

⁵ 99 N. Y. 433 (1885).

this is done only when it can be done without injustice to New York citizens, and without prejudice to the rights of creditors pursuing their remedies in New York by attachments made under New York statutes.

The New York courts have made their doctrines consistent and harmonious by holding in the case of *Warner v. Jaffray*¹ that under the United States Constitution a citizen of New York who is also a citizen of the United States cannot be enjoined in New York from acquiring property by judicial proceedings in another State by methods which are regular and lawful in the State where the same are had.

It is interesting to contrast the results arrived at in New York, Connecticut, and New Hampshire with those reached in Maine, Massachusetts, and Pennsylvania.

In *Lemon v. The People*,² Denio, J., says: —

“The Constitution declares that the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States (Art. IV. Sec. 2). No provision in that instrument has so strongly tended to constitute the citizens of the United States one people as this. Its influence in that direction cannot be fully estimated without a consideration of what would have been the condition of the people if it or some similar provision had not been inserted. Prior to the adoption of the Articles of Confederation the British colonies on this continent had no political connection, except that they were severally dependencies of the British Crown. . . . When, in consequence of the Revolution, they severally became independent and sovereign States, the citizens of each State would have been under all the disabilities of alienage in every other, but for a provision in the compacts into which they entered, whereby that consequence was avoided. . . . The Constitution organized a still more intimate Union, constituting the States, for all external purposes and for certain enumerated domestic objects, a single nation; but still the principle of state sovereignty was retained as to all subjects except such as were embraced in the delegations of power to the General Government or prohibited to the States. . . . The provision conferring rights of citizenship upon the citizens of every State in every other State was inserted substantially as it stood in the Articles of Confederation. The language is that they shall have the privileges and immunities of citizens in the several States. In my opinion, the meaning is that in a given State every citizen of every other State shall have the same privileges and immunities — that is, the same rights — which the citizens of

¹ 96 N. Y. 248 (1884).

² 20 N. Y. 562 (1860).

that State possess. . . . They can hold property by the same titles by which every other citizen may hold it, and by no other. . . . The position that a citizen carries with him into every State into which he may go the legal institutions of the one in which he was born, cannot be supported. A very little reflection will show the fallacy of the idea."

Illinois. — In Illinois the case of *Rhawn v. Pearce*,¹ decided in 1884, gave promise that the Illinois court was about to come into line with Connecticut, New Hampshire, and New York, and adopt a broad and consistent constitutional doctrine.

The language of the New York Court in *Hibernia National Bank v. Lacombe* was cited with approval, and it was held that a statutory insolvent assignment in Pennsylvania was inoperative in Illinois against a subsequent attachment by a citizen of Pennsylvania. But this hope was destined to disappointment, at least so far as voluntary or common law assignments are concerned; and in three recent cases, *May v. First National Bank*,² *Woodward v. Brooks*,³ and *Juillard v. May*,⁴ it was held, consistently with what has since been held in Massachusetts in *Frank v. Bobbitt*, *supra*, that a non-resident creditor has not the same rights as an Illinois creditor; and the doctrine by which a foreign common law assignment is inoperative, in Illinois, as against Illinois creditors, does not apply so far as creditors from other States are concerned. The constitutional objections, as is usual, are ignored rather than considered and met. The reason for this inconsistency as to common law assignments seems to have been this: It had become settled in Illinois, contrary to the weight of authority elsewhere, that foreign common law assignments should have no effect in Illinois as against Illinois creditors, who were to be paid in full before any assets should be allowed to go out of the State to an assignee for the benefit of creditors not citizens of Illinois. See *Heyer v. Alexander*; ⁵ *Henderson v. Schaas*.⁶ But when it came to going so far from the doctrines established elsewhere upon the effect of common law assignments as to hold that they should be inoperative in Illinois as regards citizens of other States, the courts were reluctant to take the step, and so made a distinction between common law insolvency assignments and statutory insolvency assignments, and as regards common law assignments refused to apply the doctrine of equal

¹ 110 Ill. 350.

² 122 Ill. 551 (1887).

³ 128 Ill. 222 (1889).

⁴ 130 Ill. 87 (1889).

⁵ 108 Ill. 385 (1884).

⁶ 35 Ill App. 156 (1889).

rights under the Constitution. See *Walton v. Detroit, etc., Mills*.¹

Minnesota. — The courts in Minnesota seem disposed to follow the Connecticut, New York, and New Hampshire doctrine.

In *Jenks v. Luddin*,² the court say: "We think we may lay it down as now reasonably well settled that when once in court and accepted as a suitor, neither the law nor the court administering it will make any distinction between citizens of their own State and those of another, but that a citizen of one State, rightfully in court, pursuing a remedy given by the laws of another State, may enforce that remedy to the same extent and in the same manner and with the same priority of lien as a citizen of the forum."

Louisiana. — It seems to be settled in Louisiana that the courts of that State will do more for citizens of Louisiana than they will for citizens of other States, especially where the non-residents are citizens of the State where the assignment has been made.³

South Carolina. — In South Carolina the doctrine of equal rights has been approved, and seems likely to prevail. See *Ex parte Dickinson*,⁴ which was the case of a voluntary or common law assignment in New York, with preferences. This assignment was held invalid in South Carolina, as being in violation of a South Carolina statute. The attaching creditors were citizens, some of New York, and some of Connecticut. It was held that they had the same rights as citizens of South Carolina. The language of the court in *Hibernia National Bank v. Lacombe*⁵ is cited and approved.

Iowa. — In *Moore v. Church*,⁶ a voluntary assignment in New York with preferences was held invalid as against a subsequent attachment of real estate in Iowa, even though the attaching creditor was a citizen of New York. The doctrine that a citizen of a State is bound by its laws even when out of the State, and hence is to be treated differently from citizens of the place which he happens to be visiting, is not adopted.

Wisconsin. — The courts in Wisconsin seem disposed to adopt the doctrine of discrimination, or, as it may be called, of unequal

¹ 37 Ill. App. 264 (1889).

² 34 Minn. 482, 486 (1886).

³ See *Olivier v. Townes*, 2 Martin N. S. 93 (1824); *The United States v. Bank of the United States*, 8 Robinson, 414 (1844); *Richardson v. Leavitt*, 1 La. An. 430 (1846).

⁴ 29 So. Car. 453 (1886).

⁵ 70 Ia. 208 (1886).

⁶ 84 N. Y. 367.

rights. In the very late case of *Gilman v. Ketcham*,¹ it was held that the title of a receiver appointed in New York was superior to a subsequent attachment of personal property in Wisconsin, the attachment being made by a New York creditor. It was assumed that the rule would have been otherwise in case the attachment had been by a Wisconsin creditor. The Pennsylvania and Illinois cases were chiefly relied on. The constitutional question was not discussed.

Missouri. — In *Einer v. Beste*,² the citizenship doctrine was considered, and the rule that citizens of the State where a statutory assignment is made are bound by it even when abroad, was adopted. Citizens of all other States were considered to have equal rights with citizens of Missouri. The constitutional point was raised in argument, but was not discussed in the opinion of the court. The same discrimination was made in the case of a common law assignment.³ If a common law assignment is good according to the law of the State where it is made, and is also good according to Missouri law, it will take full effect in Missouri.⁴

New Jersey. — Special favoritism is shown by New Jersey courts towards citizens of New Jersey. If a foreign common law assignment is good according to the law of the State where made, it is good in New Jersey as against citizens of the State where it is made, and also as against citizens of all other States except New Jersey. It is said that a New Jersey court will not send citizens of New Jersey out of the State to collect their debts if there are assets in the State.⁵ The New Jersey cases have had considerable influence in other States, and, as we shall show further on, have had some effect upon the United States Supreme Court. In New Jersey they have one law for the citizens of the State, and another law for the stranger within their gates. In *Boehme v. Rall*⁶ it was in effect held in New Jersey that while it is true that a person is bound by the law of his domicile, when acquiring by attachment personal property situated in another State, he is not bound by the law of his domicile when disposing of personal property so situated.

¹ 54 N. W. 395 (1893).

² See *Thurston v. Rosenfield*, 42 Mo. 474 (1868).

³ 32 Mo. 240 (1862).

⁴ *Askew v. La Cygne Bank*, 83 Mo. 369 (1884).

⁵ See *Moore v. Bonnell*, 2 Vroom, 90 (1864); *Bentley v. Whittemore*, 19 N. J. Eq. 462 (1868); *Green v. Wallis Iron Works*, 49 N. J. Eq. 54 (1891).

⁶ 26 Atl. 832 (1893).

In the one case the *lex rei sitae* does not govern, and in the other it does.

Ohio. — The citizenship doctrine was considered in Ohio as early as 1839, and it was then suggested that under the Constitution the law should be the same for the stranger and for the citizen, — that justice should not be meted out with different measures.¹

Vermont. — In *Ward v. Morrison*,² a citizen of New York sued and attached by trustee process in Vermont. The court say: "By the United States Constitution, the citizens of each State shall be entitled to all the privileges and immunities of citizens of the several States. Art. IV. Sec. 2. And if we should deny to the plaintiffs the use of our courts to enforce their legal rights . . . as fully as they may be used by the citizens of Vermont for that purpose, there might be ground to complain of an infraction of this provision of the Constitution."

In *Hanford v. Paine*,³ the court say in substance that citizens of Vermont ought not to have any greater advantage in the courts of Vermont in the way of attachment than citizens of other States.

Idaho. — I give this State the last place, because it is from the Idaho court that we have one of the latest as well as one of the best statements of the doctrine of equal rights. The case is that of *Barnett v. Kinney*.⁴ A resident of Utah made a common law assignment, with preferences. There was personal property in Idaho as well as in Utah. The insolvent laws of Idaho forbade assignments with preferences. A Minnesota creditor sued and attached in Idaho. It was held by a majority opinion, first, that the Idaho statute forbidding assignments with preferences applies to foreign as well as to domestic assignments; second, that resident and non-resident creditors have equal rights in the matter of acquiring property by attachment.

Sweet, J., says: —

"The attachment laws of this Territory give no preferences as between resident and non-resident attaching creditors. Sec. 2, Art. IV. of the Constitution reads as follows: —

" 'The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States.'"

"We must conclude that the non-residence of the attaching creditor in this case could not in any manner prejudice his rights, and that he

¹ See *Sortwell v. Jewett*, 9 Ohio, 181 (1839).

² 25 Vt. 598 (1853).

³ 32 Vt. 443, 457 (1860).

⁴ 2 Idaho, 706 (1890).

was entitled to the same privileges that under the same circumstances would be accorded to any citizen of Idaho.

"When once a citizen has been accepted by any court of the United States as a suitor, it does not seem to be in accordance either with the principles of justice or with common fairness, or with common honesty between man and man, to question him as to the particular State in which he may reside, and then give or refuse him what the court would deem to be justice if the suitor were a citizen of our own State, but deny him this supreme right if the fact is developed that he is a citizen of another State.

"We do not think the court justified in asking the citizen who seeks the beneficial protection of its laws whence he came, with a view to administering the law accordingly."

United States Circuit Courts. — We find a few cases in the Circuit Courts where the comparative rights of residents and non-residents are considered.

One such case is *Atherton v. Ives*,¹ where it is stated that no distinction should be made between home creditors and non-resident ones: "We think such a distinction should never be drawn by a court, unless compelled to do so by legislative will clearly expressed. It may be that the legislature of a State has the power to exercise such a 'patriarchal and provident sovereignty,' but this court will not assume such is the legislative will."

In *Halstead v. Straus*,² Mr. Justice Bradley recognized and followed the New Jersey doctrine that in New Jersey greater rights are to be accorded to citizens of New Jersey than are allowed to citizens of other States.

This case should be compared with *Faulkner v. Hyman*.³

United States Supreme Court. — In the early case of *Harrison v. Sterry*,⁴ English creditors were allowed equal rights with American creditors in the way of attachment of assets of an English bankrupt.

In *Green v. Van Buskirk*,⁵ the court say: —

"We cannot see why, if Illinois in the spirit of enlightened legislation concedes to the citizens of other States equal privileges with her own in her foreign attachment laws that the judgment against the personal estate, located in her limits, of a non-resident debtor which a citizen of New York lawfully obtained there, should have a different effect given to

¹ 20 Fed. Rep. 894 (1884).

² 32 Fed. Rep. 279 (1887).

³ 142 Mass. 53.

⁴ 5 Cranch, 289 (1809).

⁵ 7 Wall. 139, 151 (1868).

it under the provisions of the Constitution and the laws of Congress because the debtor against whose property it was recovered happened also to be a citizen of New York."

In *Paul v. Virginia*,¹ it is said in substance that the United States Constitution gives to citizens of each State the same freedom possessed by the citizens of those States in the acquisition and enjoyment of property, and it secures to them the equal protection of their laws.

*Cole v. Cunningham*² presented a question of the National rights as against the State rights of residents of Massachusetts. The question to be determined was what limits, if any, do the Constitution and laws of the United States place upon the power of a State in dealing with one of its own citizens who has made an attachment in another State. The majority of the court held in this case that the power of a State is such that it may prevent its citizens from doing in another State what it is lawful for them to do there; that it may prevent their acquiring property by attachment in another State by modes which are there lawful both for residents and non-residents; that a distinction is to be made between attachments and judgments; and that the title or inchoate right gained by an attachment may be taken away, while the title or completed right gained by a judgment cannot be interfered with. Allusion was made, on pages 128, 129, to the conflicting views which exist as to the comparative rights of creditors who are residents and creditors who are not residents of the State where property is located.

Notice was also taken of the fact that citizens of the State where the assignment was made are by many courts held to be bound by the assignment.

In *Reynolds v. Adden*,³ it was held that the courts of Louisiana could, if they so desired, discriminate between creditors coming from the State where insolvency proceedings were had, and those coming from elsewhere. The constitutional question is not discussed. It is assumed that a creditor carries the law of his domicile with him when he goes abroad to make an attachment.

One of the latest cases on the subject (which happens to be a case in the United States Supreme Court) leaves it still doubtful what constitutional doctrine will be finally adopted by the

¹ 8 Wall 180 (1868).

² 133 U. S. 107 (1889).

³ 136 U. S. 348 (1889).

United States Supreme Court. I refer to the case of *Barnett v. Kinney*.¹ The case came up on appeal from the State court of Idaho.² The decision of the Idaho court was reversed on the ground that the Idaho statute did not apply to foreign assignments, and so the assignment made in Utah was good in Idaho. In this view of the case it was not necessary to decide as to the comparative rights of residents and non-residents, and what is said on this point must be considered merely as *dicta*. It is important to notice, however, that the United States Supreme Court shows an inclination in this case, as in *Cole v. Cunningham*, to adopt what we have called the Pennsylvania-New-Jersey-Massachusetts doctrine, instead of the Connecticut-New-Hampshire-New-York-Idaho doctrine.

It is to be hoped that when the United States Supreme Court comes to an actual decision upon this important constitutional question, we shall have all the cases upon the subject considered, especially those that support the doctrine of equal rights.

Conclusion.— I have sought in this article to call attention to the fact that for many years in different parts of the country, now here, now there, able lawyers and learned judges have been considering the constitutional questions which have arisen in connection with insolvency assignments. Where the matter has been treated in a narrow and so to speak local manner, the doctrine of discrimination has been favored. Where the matter has been looked at broadly, and the provisions of the Constitution fairly examined, the doctrine of equal rights has been adopted. Too often the constitutional provisions have been altogether lost sight of. Is it not desirable that these questions should be considered, and if the courts of some of the States are acting in violation of the United States Constitution, that this should be known and put a stop to?

Considerations of space have prevented me from discussing a number of questions connected with insolvency assignments which are every day gaining added importance. One of these is the proper effect of a statutory insolvency assignment when made outside of the debtor's domicile.³

¹ 147 U. S. 476 (1892).

² See report of case *supra*.

³ See *Chipman v. Peabody*, 34 N. E. 563 (Mass.) (1893).

In England a debtor may be put into bankruptcy if he has a place of business in England, no matter where his domicile may be.¹

In Massachusetts under a recent statute certain foreign corporations doing business in Massachusetts may be put into insolvency in Massachusetts, and the assignee will take such assets as are in the State.

The question at once arises, What are assets within the State? Are book accounts such assets, where the claims are against parties living in Massachusetts, and how is it when the claims are against parties living out of Massachusetts?

Hollis R. Bailey.

¹ See *Ex parte McCulloch*, 14 Ch. D. 716 (1880).

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LIFE, LIBERTY, AND PROPERTY. — The modern tendency to define very widely the terms "liberty" and "property" in the clause, "no person shall be deprived of life, liberty, or property without due process of law," has received fresh illustration in a recent decision of the Supreme Court of Illinois (*Braceville Coal Co. v. People*, 26 Chicago Legal News, 76). A statute which enacted that corporations of certain kinds should pay the wages to their employees on fixed days was held a deprivation both of liberty and of property, and so unconstitutional. "Liberty" was said to embrace "the right of every man to be free in the use of his powers and faculties, and to adopt and pursue such vocation or calling as he may choose." The privilege of contracting was said to be a liberty and a property right. This sort of interpretation seems to be growing. It is the established doctrine in New York. The courts of Massachusetts and of other States have used language to the same effect. But the tendency is almost wholly of recent origin. It is to be noticed also that this loose doctrine has never been sanctioned by any decision of the Supreme Court of the United States, though it may have sprung from the individual expressions of Mr. Justice Bradley in his dissenting opinion in the Slaughter-House cases. But the actual decision of that case, so far as the point was touched upon, was certainly contrary. It is rather curious that the case should have been cited by the Supreme Court of Illinois as authority for their view.

The manner of approaching these questions in modern cases is unfortunate. The duty of the court ought to be plain. It is to determine the exact meaning the framers of the Constitution intended these words to have, and to decide this as a question of constitutional law. It is surely a mistaken course to be guided in such a matter by economic theories of property, or by some new political notion of liberty. These are legal questions. Now, in the absence of special conditions, the phrase ought to have the same interpretation given it in every State; for all the newer States have copied it from our older constitutions, and these

in turn found it ready made in the English common law. Then the reasoning of the court ought to lie within clear, well-defined limits. The courts should try to find out the meaning this clause had when used in the English common law before its adoption in our constitutions. This presumptively is the meaning it has in any particular constitution. Now, it is believed that such an investigation will show that the explanation of the term "liberty" given in the fourth volume of this REVIEW¹ is the correct one. It was there said that "liberty" had a plain definite significance, — "that no freeman should be taken or imprisoned," — and nothing more. It is believed that the meaning of "property" is equally simple. In spite of the assertion that more is protected than the thing which is the subject of physical possession, it is improbable that such is the case. Probably property meant what most people not lawyers would say to-day it means; namely, chattels and interests in land either corporeal or incorporeal. No man was ever to be imprisoned, and no man was to have his horses or lands taken from him, except by due process of law. From this, which it is submitted is the original meaning, we have developed the idea that a law which fixes certain days on which a corporation must pay wages deprives it of its liberty and of its property.

Apart from the unsoundness of the position, the definition is so vague as to be useless as a practical working guide. This becomes apparent by reading the cases where such views are upheld. Nearly always the court attempts to fortify its position by arguments as to wisdom or expediency of the questioned legislation, — an assumption of legislative functions which can result in nothing but harm.

CONTRACTS — ACCEPTANCE OF OFFER. — The courts in England and, with the exception of Massachusetts, in the United States hold that a contract made by mail is complete and binding from the moment that the letter of acceptance is put in the post. It is for merchants rather than for lawyers to speak to the commercial expediency of this rule; but so far courts and law-writers have defended it on principle, and have therefore necessarily treated the Post Office as acting throughout the transaction for the original proposer. Mr. Justice Holmes in his *Common Law* (p. 306) says that "The offeree when he drops the letter containing the counter-promise into the letter-box does an overt act which by general understanding renounces control over the letter and puts it into a third hand for the benefit of the offerer, with liberty to the latter at any moment thereafter to take it." Mr. L. C. Innes, late judge of the High Court, Madras, says in a very careful and able article on the subject in the *Law Quarterly Review*, ix. 316, that "the offerer extends his personality through the post as his agent for the reception of the acceptance or refusal of the offer." And these may safely be accepted as examples of that view. But in the United States there is a serious difficulty, perhaps not generally understood, in accepting the premises of these arguments: the sender of a letter does not "renounce control" over it; the postal authorities do not act as the offerer's agent to receive the return message. For by Secs. 487, 488, and 489 of "Postal Laws and Regulations, 1893," it appears that the writer or sender may apply for a letter in the mails, and when satisfactory proof of identity has been furnished, may

¹ 4 *Harvard Law Review*, 365.

receive it back, and the passage is mandatory: "the postmaster" applied to "shall telegraph a request." "On receipt of such request the postmaster at the office of address *shall* return such letter to the mailing postmaster, . . . who will deliver it to the writer upon payment of all expenses." (For mention of a decision on these sections, see the *American Lawyer*, November, 1893, p. 8.) The result of this conflict of law and postal regulations is that the original proposer of a contract is bound from the time of acceptance; the acceptor is not bound in practice until his letter has been delivered. He may be bound in law, but if he gets his letter back and burns it up, he cannot be held in court. So for one party to the contract we have one rule, for the other the other. It may be urged that in fact men do not descend to such tricks as this. Most men do not; but it is the unscrupulous men seeking to avoid their liabilities who test the weak points of the law. Probably it is true that in a great majority of the cases the common rule does no harm; perhaps it is in those cases slightly for the convenience of those who deal through the mails. It does, however, do injustice, gross injustice, in such cases as *Vassar v. Camp*, 11 N. Y. 441, and it could be used to do great injustice by virtue of these postal regulations. The Massachusetts rule (*McCulloch v. Eagle Insurance Co.*, 1 Pick. 283) is tenable without assumptions incompatible with the lack of agency in fact, and does not do injustice. When the two rules come up to be argued upon the question of expediency, we shall get some light upon their practical convenience; but until then the law will rest on these two premises: that the sender renounces control over the letter, and that the Post Office acts as the agent of the proposer of the contract, each rendered untenable by the assertion and practice of the contrary by the Post Office.

The English cases are in Mr. Innes's article; the American are in Bennett's *Benjamin on Sales* (1892), pp. 65 ff.; and see Professor Langdell's article in 7 *Am. L. Rev.* 432; also *Patrick v. Bowman*, 149 U. S. 411.

Laidlaw v. Sage.—The case of *Laidlaw v. Sage*, which has just been decided by the Supreme Court of New York (*New York Law Journal*, vol. x. No. 44), arose upon a very extraordinary state of facts, and the opinion of the court (Van Brunt, P. J.) is suggestive in regard to more than one point.

The facts appearing upon the trial below were substantially these:

The plaintiff was a clerk who had called to transact business with Mr. Russell Sage. He was standing in Mr. Sage's office, waiting until Mr. Sage should finish talking with another caller who was then engaging his attention. This man, whose name was Norcross, had just handed Mr. Sage a letter, in which he threatened to drop a satchel full of dynamite, which he carried, on the floor, and so blow up the building, unless Mr. Sage would immediately give him \$1,200,000. Mr. Sage, after reading the letter, answered Norcross evasively, and at the same time, according to the plaintiff's story, approached the plaintiff, and gently laying hold of him in such a manner as not to excite his suspicion, drew him into a position between himself and the dangerous visitor. Thereupon Norcross dropped his satchel. An explosion followed, by which the plaintiff was very seriously injured. This suit was brought to recover for these injuries, which the plaintiff claimed had been sustained in consequence of Mr. Sage's wrongful act.

A motion to dismiss was granted by the Circuit Court, on the ground that there was no evidence to support the action. The Supreme Court reversed this judgment, and ordered a new trial. The language of the opinion of the Supreme Court is not very precise, but the result reached seems clearly right. It would have been at least possible for a jury, acting within the bounds of reason, to find that the defendant, fearing that Norcross would execute his threat, deliberately pulled the plaintiff in front of him in order to protect his body. If this was the truth, the defendant's act was wrongful; and certainly it could not be said, as matter of law, not to be a proximate cause of the plaintiff's injury. And this is apparently what the court means in saying that "there is no question of proximate cause." On the ground, therefore, that the evidence raised a question for the jury, the Supreme Court did only common justice to the plaintiff in reversing the decision of the court below.

The court, however, is not content to let the matter rest here. There follows a discussion of the "burden of proof" in such cases as the present which seems not wholly satisfactory. Under the circumstances of the case, the court says, "The burden is thrown upon the defendant of establishing that his wrongful act did not in the slightest degree contribute to any part of the injury which the plaintiff sustained by reason of the explosion." Here is certainly some confusion. If the court means that the jury might fairly assume from the facts in evidence, without more, that the defendant's act was in a legal sense a cause of the plaintiff's injury, and that therefore the duty of going forward with evidence might lie on the defendant, this is no more than is involved in reversing the judgment of the lower court and in what has been already said. But if the court means to lay down as a rule of law any doctrine to the effect that under the circumstances of cases like the present the jury *must* find for the plaintiff, unless the defendant can show affirmatively that his act "did not in the slightest degree contribute to any part of the injury which the plaintiff sustained," then surely the court is laying down new law. The court says, "The whole ground-work of the respondent's argument is that the motion to dismiss was properly granted because it was incumbent upon the plaintiff to establish that, without Sage's act, he would not have been injured; thus completely turning around the question as to the burden of proof." Here both words and context seem to indicate clearly that the meaning of "burden of proof" which the court has in mind is the burden of establishing an affirmative case. The result is that the plaintiff is relieved from the necessity of establishing affirmatively that his injury was in a legal sense the outcome of the defendant's misconduct, because the defendant's act was a wrongful one at best. Probably, however, the court does not mean to assert any such doctrine. What was said was said by the way, and rather hastily; if the point had been material to the case, it would doubtless have been more carefully considered.

Another interesting question is likely to arise at the next trial. The defendant will probably advance the theory that his act was instinctive, and ask for an instruction to the jury that if his action was involuntary and such as would instinctively result from a sudden and irresistible impulse to escape a terrible danger, he is not liable to the plaintiff for the consequences of it. Upon the principle advanced in the celebrated *Squib Case* and such cases as *Griggs v. Fleckenstein*, 14 Minn. 81, it is difficult to see how such an instruction could be refused. It may well

be doubted, however, whether the facts as we have them do not show a rapid exercise of the reasoning faculty, rather than purely impulsive action.

LIABILITY FOR "NERVOUS SHOCK."—A clear and well-considered opinion on the subject of liability for physical injuries ensuing upon "nervous shock," or fright caused by negligence, is to be found in 25 N. Y. Suppl. 744 (*Mitchell v. Rochester St. Ry. Co.*, Circuit Court, Monroe County). The plaintiff, a married woman, was about to board one of the defendants' street-cars. A car on the opposite track was driven down the hill towards where the plaintiff stood with such speed that the driver could not check his horses until they had almost run into the plaintiff. She was not actually touched, but the fright and excitement of the occurrence produced unconsciousness. As a result of the shock, the plaintiff suffered a miscarriage, and was ill for a long time. Competent physicians testified that the shock was a sufficient cause for all the physical ailments which followed it. Upon the close of the plaintiff's testimony a nonsuit was granted by the trial court. The Circuit Court set this nonsuit aside, holding that "it would have been competent for the jury, upon the facts which appear, to conclude that the negligence of the defendant was the proximate cause of the injury which befell the plaintiff."

The decision is in accordance with the facts within every man's experience. The testimony of physicians is not necessary to prove that ill-health may result from shock. Why, then, in this and similar cases, should the defendant be excused from liability for the natural and proximate consequences of his negligent act? No satisfactory reason for excusing him has been advanced. It has been said in the Privy Council and in the Supreme Court of Pennsylvania that a judgment for the plaintiff would open a wide field for imaginary complaints. But, as the court says in the present case, "the argument *ab inconvenienti* is never of much force, and least of all when it is invoked to enable one to avoid a necessary legal conclusion."

The analogies of the law seem to point irresistibly towards the allowance of a recovery in cases of nervous shock where the plaintiff has proved resulting physical injury. If the admitted negligence of the defendant had acted on brute rather than human nerves, and had produced fright which resulted approximately in injury to the plaintiff, she could certainly have recovered. If the driver of the defendant's car had driven so negligently as to frighten a horse attached to a buggy in which the plaintiff was sitting, and if the horse had run away and thrown her out, she would have had a clear right against the defendant (*McDonald v. Snelling*, 14 Allen, 290). So where a horse was frightened to death by the defendant negligently exploding a fire-cracker between his legs, the owner recovered his value (*Conklin v. Thompson*, 29 Barb. 218). Now, if the defendant is liable for injury to the plaintiff which is the mediate result of fright produced in the mind of a brute, why is he not liable for injury which is the immediate result of fright produced in the plaintiff's own mind? The law recognizes that a man's mind and nerves may be as effectually surprised and overpowered as a brute's (*Scott v. Shepherd*, 1 Sm. L. C. 480; *Holmes v. Mather*, L. R. 10 Ex. 261; *Ricker v. Freeman*, 50 N. H. 420). So where a plaintiff has acted to his damage on an impulse of self-preservation arising from a dangerous situation

in which the defendant has placed him, he may recover, although he would not have been harmed if he had remained where he was (*Jones v. Boyce*, 1 Stark. 493; *Stokes v. Saltonstall*, 13 Pet. 181; *Coulter v. Express Co.*, 56 N. Y. 585). In the present case, if the plaintiff had in her fright stepped back from the track to avoid the car, and fallen directly under the wheels of a passing wagon, she would have had a clear case against the defendant.

If the horses in *Mitchell v. Rochester St. Ry. Co.* had touched the plaintiff, however slightly, her right to recover for her injuries would have been undoubtedly perfect. No intent is necessary to constitute a battery; negligence and unpermitted contact are enough (*Weaver v. Ward*, Hob. 134). Actual impact is not essential to an assault; a putting in fear is sufficient to constitute the wrong. If no intent to strike is necessary to make a battery, why should an intent to put in fear be necessary to make an assault? If the law draws a line here between an assault and a battery, upon what reasoning is the distinction to be supported? The action of assault is not in the nature of a criminal proceeding against the defendant. Why, then, is his intent material? What matters it to the plaintiff whether the defendant intended to commit or negligently committed the act which put the plaintiff in fear of his life?

The authorities upon the subject are few, and unfortunately divided. The earlier New York case of *Lehman v. Railroad Co.*, 47 Hun, 355, is cited by the Circuit Court, and distinguished on the ground that no negligence was alleged in the case as it appears in the report. The opinion in that case was short, and there was no statement of reasons for the decision; but certainly the case does not appear to have proceeded on the ground assigned by the Circuit Court. The case in the Privy Council (*Commissioners v. Coultas*, 13 App. Cas. 222) is also cited, and its reasoning disapproved. The Irish cases which serve to counter-balance *Commissioners v. Coultas* (*Bell v. Railway Co.*, 26 L. R. Ir. 428, and *Byrne v. Railway Co.*, Court of Appeal, Ireland, unreported) are not noticed by the Court, though the former contains perhaps the best-reasoned discussion of the subject. *Purcell v. Railway Co.*, 48 Minn. 134, is directly in point for the plaintiff, unless it be said that the contract duty of the defendant towards the plaintiff influenced the decision. There was a similar duty, indeed, in *Bell v. Railway Co.*, though the Irish court does not found its decision upon that fact. In *Mitchell v. Rochester St. Ry. Co.*, the court takes pains to point out that no contract duty existed, the plaintiff not having boarded the car. *Fell v. Railroad Co.*, 44 Fed. Rep. 248, and *Stutz v. Railroad Co.*, 73 Wis. 147, while distinguishable, tend strongly to uphold the plaintiff's contention. The whole subject is discussed, and a conclusion reached favorable to the plaintiff's recovery, in Beven on Negligence, 66, 2 Sedgwick on Damages, 8th ed., 643, and 1 Sutherland on Damages, 2d ed., 44.

THE RULE IN *DEARLE v. HALL*.—In the important case of *Dearle v. Hall*, 3 Russ. 1, it was held that if the second assignee for value of an equitable interest gave notice of his claim to the trustee after inquiry as to incumbrances, and the first assignee gave no such notice, the second assignee thereby obtained a priority in favor of his equity.

The property transferred is a relation, and only gives the assignee a

claim through his assignor. Each assignee then has exactly the same right, viz., a claim against the trustee through the *cestui*, and one is prior. The English court says that the priority is divested by a failure to give notice. This deprivation or priority must arise from the failure to perform some duty. The assignee owes no duty to the assignor, but, on the contrary, may hold his assignor to an obligation; nor does he owe any duty to the trustee, for the latter is protected if he pays the *cestui* without notice of the assignment. The only possible duty, therefore, is a duty to give notice, in order that future purchasers may not part with their money for a valueless claim. The soundness of this view depends on the somewhat questionable hypothesis that the assignee of an equitable interest is bound to anticipate and provide against the rascality of his assignor; and certainly no severe criticism can be passed on those courts which do not adopt the rule (*e. g.*, New York, *Muir v. Schenck*, 3 Hill, 228, and Massachusetts, *Putnam v. Story*, 132 Mass. 205). But the English courts in *Foster v. Blackstone*, 1 My. & K., affirmed in *Foster v. Cockerell*, 3 Cl. & F. 456, extended their principle beyond the limits of this debatable ground into the territory of judicial legislation, and held that the assignee first giving notice obtained the priority, although he had made no inquiry as to previous assignments. However desirable the result, — and that it is desirable appears from its similarity to our registry laws, — the decision must be regarded as unjustifiable from the judicial point of view.

Under these circumstances, the opinion of Lord Macnaghten in the recent case of *Ward v. Duncombe*, Appeal Cases [1893], 369, is of the utmost value. The case itself simply amounted to a refusal to extend the rule of *Dearle v. Hall* unnecessarily; but Lord Macnaghten's discussion of the subject is the most valuable to be found in the books.

He shows that the reasoning in defence of the rule is vicious. "It has been said that notice is necessary in order to 'perfect' the title of the assignee, in order to 'complete' his title. . . . Notice does not render the title perfect. Notice was not even a step in the title until it was made so by the decision in *Foster v. Cockerell*. Apart from the rule in *Dearle v. Hall*, an assignee of an equitable interest from a person capable of disposing of it has a perfect equitable title, though the title is no doubt subject to the infirmity which attaches to all equitable titles. And that infirmity is not and cannot be wholly cured or removed by notice to the trustees."

Further, he shows that notice does not "convert" the trustee of the fund into a trustee for the person who gives the notice. Notice fixes a personal liability upon the trustee, but he is just as much a trustee for the persons rightfully entitled before as after notice, though before notice he would be justified in paying the fund to those who appeared to be the true owners. Lord Macnaghten admits that *Dearle v. Hall* has the binding force of law, but concludes that "it has on the whole produced at least as much injustice as it has prevented."

The American courts do not in general adopt the rule of *Dearle v. Hall*. See Perry on Trusts, vol. i., 2d ed., p. 527, note 1.

RECENT CASES.

AGENCY — DEL CREDERE FACTOR — CLAIM AGAINST ESTATE OF INSOLVENT PRINCIPAL. — A factor under a *del credere* commission was by his contract to make monthly advances to his principal. The principal became insolvent, and the question arose whether the factor could prove for his full claim against the assignee and look to the property in his hands for anything still due. But it was *held*, that he must exhaust that property first, and only prove against the assignee for the balance. *Balderston v. Rubber Co.*, 27 Atl. Rep. 507 (R. I.).

The advances are treated substantially as prepayment to the principal. The factor, therefore, had no claim until he had exhausted the property in his hands. The case follows *Gihon v. Stanton*, 9 N. Y. 476, and seems to adopt a sensible construction of the contract of a *del credere* factor who makes advances. As the court point out, the term "advance" is meaningless if the party who makes an advance can immediately turn round and sue to recover it back. *Upham v. Lefavour*, 11 Met. 174, and *Dolan v. Thompson*, 126 Mass. 183, are treated in the principal case as opposed to the doctrine there expressed. Probably they go no farther than to say an advance is a loan for a reasonable time, and after the expiration of such a time the factor can sue for the loan without first exhausting the property in his hands. They are, therefore, opposed to the opinion expressed in the principal case as to the precise construction of the contract, but would not necessarily involve a different result upon the facts.

BILLS AND NOTES — CONSTRUCTIVE NOTICE. — The directors of a railroad corporation authorized one Frost, its president, to purchase flat cars and give notes of the corporation for that purpose. In pursuance of this vote notes were made in the name of the corporation, and signed by Frost as president. For safety of the corporation in case of loss, instead of making the notes payable in blank, they were made payable to the order of Bruen, Frost's private secretary, who was to indorse them when Frost got ready to use them. Subsequently these notes, having received the blank indorsements of Bruen and of Frost & Son, a firm of which said Frost was a member, were pledged by Frost, together with bonds belonging to the firm, as collateral security for a loan made by the plaintiff to the firm. Frost appropriated the loan to his own use. Later the plaintiff became entitled to the notes outright, and brought action upon them against the corporation. *Held*, that as the plaintiff knew that Frost was president of the corporation, he was bound to inquire how the president came to use the notes for his individual benefit, and therefore the plaintiff acted at his peril and cannot recover. *Cheever v. Pittsburgh S. & L. E. Ry. Co.*, 25 N. Y. Supp. 449.

This decision cannot be supported. There was no evidence of any actual notice, and it is impossible to take the step which the court take so easily, and say with them that the plaintiff had constructive notice of fraud, and was put upon his inquiry. The court does not seem to have appreciated fully the transaction between Frost and the plaintiff. It was simply this: Frost, as a member of the firm of Frost & Son, went to the plaintiff to borrow money for the firm, just as any other member of the firm might have done. He obtained the loan to the firm, and gave the plaintiff as security what appeared to be firm property; namely, bonds, and the notes in issue, which, from aught that appeared on their faces, were the property of the firm. We have, then, a case where notes, apparently firm property, are pledged as such by a member of the firm to secure a loan to the firm; and there is no fact shown which could give rise to the application of the principle of constructive notice. See *Freeman's National Bank v. Suvery*, 127 Mass. 78.

BILLS AND NOTES — DRAFT SENT FOR COLLECTION — PAYMENT. — Plaintiff sent for collection a demand draft on defendant to a bank with which defendant had an account. Defendant was accustomed in such cases to write his acceptance upon the draft, and to pass it back to the bank, where it was treated by defendant and the bank in all respects as a check. According to such custom, defendant wrote his acceptance on the draft in suit, passed it back to the bank, and charged himself with the amount in his pass-book; but the bank failed before remitting to the plaintiff. *Held*, that this transaction did not amount to payment of the draft. *State Bank of Midland v. Byrne*, 56 N. W. 355 (Mich.).

In view of the fact that the collecting bank must be regarded as the plaintiff's agent, it is hard to see how this transaction can be properly distinguished from the defendant's paying the amount in money into the bank, which would surely have been held to be payment to the plaintiff. See *Welge v. Batty*, 11 Ill. App. 461.

CONSTITUTIONAL LAW — JUDGMENT OF SISTER STATE — EXECUTION. — A bill in equity is brought, asking specific performance of an order directing the payment of alimony, and the method thereof, made upon a judgment in a suit for divorce in the State of New York. *Held*, that the bill will not be sustained. The first section of the fourth article of the Constitution of the United States, directing that full faith and credit be given to the judgments of a sister State, does not extend to the execution of such a judgment. For this purpose a new judgment must be secured in the State in which an execution is sought, and full faith and credit shall be given to the original judgment as evidence of the matters involved. An execution of the order made upon the original judgment, as regards property without the jurisdiction of the court in which such judgment was obtained, is possible only so long as the person remains within the jurisdiction of that court. *Bullard v. Bullard*, 27 Atl. Rep. 435 (N. J.).

The case follows the weight of authority.

CONTEMPT OF COURT — PUNISHMENT. — *Held*, where a petition filed in a court contains scandalous matter reflecting on the integrity of the judge and the master in chancery of the court, it may be stricken from the files without notice, though it sets up a good cause of action. Pleasants, J., dissenting. *Herndon v. Campbell*, 23 S. W. Rep. 558 (Texas).

The result is contrary to *Hovey v. Elliott*, 21 N. Y. Sup. 108, and to the spirit of *McVeigh v. United States*, 11 Wall. 259, p. 267. It is submitted that in the absence of a statute in Texas giving the court power to take such action, the New York decision is the better. It certainly seems contrary to the first principles of justice that the plaintiff here should have his petition stricken from the files without any notice whatever. Every litigant is supposed to have the right of a hearing, at least.

CONTRACTS — CONSIDERATION. — Plaintiff had agreed to furnish wood to defendant at a certain price per cord, but was unable to carry out the agreement on account of the high wages that his workmen demanded. He wrote defendant that he must ask for a better price, and defendant agreed to pay more per cord. *Held*, there was a consideration for the second agreement. *Foley v. Storrie*, 23 S. W. Rep. 442 (Texas).

The theory is that the first contract is waived by the making of this second agreement. And, of course, this being true, the mutual promises furnish sufficient consideration for the latter. *Hare on Contracts*, p. 220; 9 Pick. 298, 305; 9 Cush. 135; 6 Ex. 839; 69 Ill. 403; 36 N. Y. 388, 392; 128 Mass. 116; 47 Mich. 489; 28 Vt. 264. But the better view seems to be that plaintiff was already bound by the first contract; that defendant never agreed to a waiver of it, and consequently that there is no consideration. *Wald's Pollock on Contract*, p. 179, note v; 6 Ohio St. 1; 52 Ia. 478; 69 Pa. St. 216; 91 N. Y. 392.

CORPORATIONS — LIBEL. — In an action against a corporation for libel it was *held*, that evidence of the defendant's wealth was not admissible. *Randall v. Evening News Association*, 56 N. W. Rep. 361 (Mich.).

The courts of Michigan allow this evidence in an action against an individual for libel; but it is considered a dangerous rule, to be used with great care. The court seems right, therefore, in refusing to extend the doctrine to the case of a corporation; but it is submitted that the argument that this sort of evidence is not so material in the present case as in that of an action against an individual is given too great weight in the decision.

CORPORATIONS — PUBLIC DUTIES — ULTRA VIRES LEASE OF FRANCHISE. — A corporation, having a franchise to lay its gas-pipes in the public streets, leased its rights and privileges to another gas company without the consent of the Legislature. The contract was partly carried into effect. *Held*, that no action lay for a breach of covenant in the lease; that the lease was *ultra vires* and void, as the company owed a duty to the public, and the only remedy for the plaintiff corporation would be to disaffirm the lease, and sue on a *quantum meruit* for the amount which the defendant was actually benefited. *Brunswick Co. v. Gas Co.*, 27 Atl. Rep. 525 (Maine).

This is the general rule, namely, that the Legislature has control over a gas company, and that it cannot escape its duty to the public by leasing its franchise. Even admitting this to be so, many cases allow a recovery on the contract when it has been partly performed; but the opposite view, as adopted in this case, is certainly more logical. The authorities upon this subject are in hopeless conflict. See 2 Beach Corp. § 423.

CRIMINAL LAW — CONSPIRACY — RESTRAINT OF TRADE. — Retail coal dealers formed an association to fix prices of coal at Lockport. According to the by-laws, a vote of the association determined prices, subject to the limitation that they must be reasonable, and never more than one dollar above the wholesale rate. The prices

actually adopted were reasonable. *Held*, that the members of the association were guilty of a conspiracy under a statute which forbids two or more persons to conspire "to commit any act injurious . . . to trade or commerce." *People v. Sheldon*, 34 N. E. Rep. 785 (N. Y.).

From the report of the principal case in the court below, 66 Hun, 590, it appears the association gave notice to wholesale dealers to sell to nobody in Lockport not a member. The statute under which the defendants were indicted is a very old one in New York, said to be declaratory of the common law. *People v. Fisher*, 14 Wend. at p. 17. When the case appeared in the court below, it was suggested, therefore, in a note in HARVARD LAW REVIEW, vii 52, that the conspiracy was in the attempt to prevent the wholesale dealers from selling to anybody outside the association, and not in the mere contract to fix prices. Such an agreement, though unenforceable, is not at common law a crime. *Mogul S. S. Co. v. McGregor* (1892), App. Cas., at pp. 39, 46, 47. In the Court of Appeals, however, Andrews, C. J., adopts a construction of the statute which seems to make every contract in restraint of trade a crime, and does not even mention the attempt of the association to "boycott" all who are not members. Such a construction of the statute is entirely possible, though there are strong reasons of expediency against it. Wharton Crim. Law, 9th ed. §§ 1366-69.

EVIDENCE — BURGLARY — EVIDENCE OF OTHER BURGLARIES. — In a trial for burglary, evidence that other burglaries were committed on the same night was admitted, in connection with proof that footsteps found about the houses entered corresponded with the shoes worn by defendant. *Held*, that the evidence was properly admitted, as tending to show a general system under which the crime in question was committed. *Frazer v. State*, 34 N. E. Rep. 817 (Ind.).

Although questions of this nature are largely within the discretion of the trial judge, still it would seem that this was a case in which the upper court might well have interfered. The principle relied on is perfectly sound. Though in general in a trial for a crime, evidence that defendant committed another crime is inadmissible, as proving nothing but defendant's wickedness, yet such evidence is undoubtedly admissible where it tends to show the existence of a general plan, pursuant to which the crime in question was committed. *Commonwealth v. Robinson*, 146 Mass. 571. But it is submitted that the principle was misapplied in this case: The evidence submitted apparently shows not such a general plan, but rather several distinct burglaries, supposed to have been committed by the defendant, which have no logical bearing upon the crime for which he was being tried.

EVIDENCE — CONJECTURAL AND MISLEADING. — Defendant was a packing company, and plaintiff, as its employee, was engaged in piling barrels. A barrel in a lower row of the pile commenced to leak, and, by order of defendant's foreman, the head of the barrel was knocked out and its contents removed. Subsequently, some barrels on the top of the pile fell off and struck plaintiff, breaking his leg. Plaintiff claimed that the injury was caused by negligence of defendant in allowing the empty barrel to remain in such a position. Defendant offered to prove by its foreman that experiments with similar piles of barrels had been made, and that a barrel in the same relative position as the empty barrel in this case had been removed without causing the pile to fall. This evidence was excluded at the trial. *Held*, no error. *Libby et al. v. Scherman*, 34 N. E. Rep. 801 (Ill.).

The court say that such evidence is conjectural merely, and would involve a multitude of collateral issues. Such questions seem to lie very largely in the discretion of the trial judges, and their rulings are not often reversed by the courts, unless a strong case is made out. This is, therefore, a question on which courts may well differ. If it could be shown that the experiments were made under substantially the same conditions as existed in the case in question, it would seem that the evidence might be admitted as tending in some degree to disprove defendant's negligence, provided it was submitted to the jury with careful instruction as to its weight and bearing. Evidence of a similar kind was admitted in the following cases: *L. R. 1 C. P. 300*; 107 U. S. 519; 52 N. H. 401. In the following it was excluded: 3 Allen, 410; 33 N. J. Law, 260.

EVIDENCE — STATUTORY PRESUMPTIONS. — A statute making it a misdemeanor to use or traffic in certain kinds of bottles, unless they have been sold by the original owner, or his written consent to their use has been obtained, declares "the having, by any junk-dealer, . . . possession of any such bottles . . . without such written consent," "presumptive evidence" of unlawful traffic in them. *Held*, that such a provision does not restrain the jury from acquitting the prisoner even though there be no evidence beyond the fact on which the presumption is declared to rest, but, on the contrary, they must still acquit if they are not satisfied beyond a reasonable doubt of

the guilt of the accused; that the fact on which the presumption was to rest has a fair relation to and a natural connection with the main fact; and that, therefore, the Legislature did not exceed its powers in enacting that the presumption should exist. *People v. Cannon*, 34 N. E. Rep. 759 (N. Y.).

This decision is noteworthy for bringing out more clearly than previous decisions that these statutory presumptions leave room for the jury to have reasonable doubts as to the prisoner's guilt, and allow the jury to acquit him, though no evidence to rebut the presumption be offered. Justice Earl's opinion would have been still more satisfactory if his language had been such as to leave clear beyond a doubt that the court considered it no part of the legitimate effect of these statutes to regulate in any way the jury in passing on the facts. It is submitted that such regulation is no part of their legitimate effect, and that their proper effect is simply to require the trial judge to leave a case to the jury where the designated fact is all that is given in evidence, when without the statute he might have directed an acquittal on the ground of lack of evidence, and, as a corollary, restrain him from setting aside a verdict as against evidence when such fact is the only evidence in the case.

REAL PROPERTY — DEED — BOUNDARIES. — Land was deeded by plaintiff's ancestors to defendant's grantors, described as beginning on north side of Bloomingdale Road, . . . thence by various courses to place of beginning. The road was closed legally, and plaintiff now seeks to recover one-half of it by an action of ejectment. Defendant claims it by the deed. *Held*, though the grantor may have retained the fee, it was subject to a private easement, impliedly granted, of which the grantor, his heirs, and assigns, cannot, after the highway is closed, deprive the grantee or his successors in title. *Holloway v. Southmayd*, 34 N. E. Rep. 1047 (N. Y.).

This is the view of the majority of the court, Earl, Finch, and O'Brien, JJ., dissenting. Maynard, J., adopts what is submitted to be the most consistent view, — that the fee passed by the deed to the centre of the street. Gray, J., who delivers the opinion of the majority, does not meet this question squarely, but says, whatever the law may be on that subject, the implied grant of an easement is enough to decide the case. It may be doubted whether, if a man expressly excludes the highway in his deed (as must be assumed here to support this as an easement), he impliedly grants an easement. The two things seem inconsistent. The simplest and soundest view is that the grantee took to the centre of the road. The deed read "beginning at north side . . . along the road." These words have been held insufficient to rebut the ordinary presumption that the grant is to the middle of the road. 33 Pa. 124; 39 N. J. L. 469; *contra*, 2 R. I. 508; 38 Mich. 62; 141 Mass. 51. See also Washburn on Real Property, vol. iii. pp. 423 *et seq.*

REAL PROPERTY — LANDLORD AND TENANT — FIXTURES — CHATTEL MORTGAGE. — A lease of mining land provided that whatever machinery the lessees might put in should form part of the realty, but that upon the termination of the lease the lessees should, on paying all rent and taxes, be entitled to remove such machinery. *Held*, that this provision included certain machinery on the land at the time the lease was executed, at that time purchased by the lessees from the lessor for unpaid rent, superior to the claims of the defendant under a chattel mortgage given by the lessees at the time the machinery was purchased from the lessor. *Pendill et al. v. Maas et al.*, 56 N. W. Rep. 597 (Mich.).

This somewhat forced construction of the lease raises the question whether the purchaser of property of the nature of fixtures may prevent its becoming part of the realty on being affixed thereto, as against the owner of the fee, — either a lessor or a subsequent vendee or mortgagee, — by placing upon it, at the time of purchase, a chattel mortgage; and the decision, that he may not, follows the same principle in *Clary v. Owen*, 15 Gray, 522 (Mass.). The extreme view opposed is that of *Ford v. Cobb*, 20 N. Y. 344, where the holder of a chattel mortgage on fixtures is allowed to take them, as against a subsequent mortgagee of the realty who took his mortgage on the faith of these fixtures. A more satisfactory decision is reached in *Davenport v. Shants*, 43 Vt. 546, where the holder of a chattel mortgage is allowed to take the fixtures except where the vendor or mortgagee of the realty has relied upon them, as part of the realty, in buying or accepting the mortgage.

REAL PROPERTY — NATURAL GAS — INJUNCTION. — Plaintiffs induced defendants to drill a gas-well in their land adjoining plaintiffs', expecting to buy it when completed. There was a disagreement about the price, and defendants allowed it to burn without utilizing it in any way. This tended to drain the sand-rock and reduce the flow in the wells on plaintiffs' land. Plaintiffs went on defendants' land and closed the well. Defendants now threaten to remove the cap, and an injunction to restrain them is sought. *Held*, no injunction will be granted. Defendants had the right to use the gas

in this way as well as any other. *Hague et al. v. Wheeler et al.*, 27 Atl. Rep. 714 (Pa.).

SALES — FRAUD — EFFECT OF JUDGMENT. — A sale induced by fraud is not affirmed by a judgment recovered in an action for the purchase-money brought by the vendor in ignorance of the fraud. *Rochester Distilling Co. v. Devedorf*, 25 N. Y. Supp. 200.

The decision is sound. Fraud makes a sale voidable at the election of the party who was deceived, and his acts before learning of the fraud do not affect the right of rescission, provided third parties are not prejudiced. The precise point decided here seems to have come up only twice before, viz., in *Krause v. Thompson*, 30 Minn. 64, cited by the court, and in *Foundry Co. v. Hersee*, 103 N. Y. 26.

STATUTES — IMPEACHMENT OF. — *Held*, that an enrolled bill on file in the office of the secretary of state, in all respects regular on its face, bearing the signatures of the presiding officers of the houses of the Legislature, regularly approved by the governor, and deposited in such office, as required by the constitution, is conclusively presumed to have been regularly passed by the Legislature. *State ex rel. Reed v. Jones*, 34 Pac. Rep. 201 (Wash.).

This point is hotly contested, and has been decided in nearly every State, with the result that the courts are very evenly divided, — a slight majority being in favor of the view that the journals control the enrolled Act. 7 Harv. Law Rev. 186. The Washington court follow the recent decisions in *State ex rel. Hoover v. Chester*, 17 S. E. Rep. 752 (S. C.); 7 Harv. Law Rev. 186; and *Field v. Clark*, 143 U. S. 649.

TAXATION — ASSESSMENT — OMISSIONS. — Certain real estate was omitted from assessment for city, county, and State taxes because the assessors believed that it was legally exempt. It was, however, liable. *Held*, that the omission did not invalidate the whole assessment. *Van Deventer v. City of Long Island*, 34 N. E. Rep. 774 (N. Y.).

This decision is the only reasonable one which could have been made and is in accord with all the authority — see *Cooley Taxation*, 2d ed., pp. 216, 217, *n.* 1, — but is interesting on account of its relation to a line of cases in the same jurisdiction beginning with *Hassan v. Rochester*, 67 N. Y. 528, which decide that where a local improvement is to be paid for by an assessment on all land within certain prescribed limits, the omission of any lot invalidates the whole assessment. The court virtually admits that there is no distinction on principle between the two classes of cases, and distinguishes them on the practical ground that if omissions were held to invalidate general assessments, few assessments could stand assault, and collection of revenue for government purposes would be attended by interminable litigation and would be uncertain. But there are many assessments on limited districts where the number of lots comprised is sufficiently large for these reasons to apply with nearly as much force as in the case of general assessments; and when an assessment on such a district comes before the New York court, the reasoning of this opinion will be pressed to make the court break in upon the rule of *Hassan v. Rochester*.

TORTS — ARREST WITHOUT WARRANT. — A warrant for the arrest of the plaintiff, who resided at a distance, having been issued to the defendant, he sent a deputy to execute it, but retained the warrant himself. The plaintiff now brings this action for false imprisonment during the time he was in the hands of the deputy, on the ground that the absence of the warrant made the detainment illegal. But *held*, that, the warrant being valid and properly executed, the plaintiff had no cause of action; for the irregular exercise of power legally conferred could give no ground of action, unless the irregularity was of a character to work loss or deprivation of freedom to the person arrested, which would not have followed an arrest in every respect regular. *Cabell, Marshal, v. Arnold*, 23 S. W. Rep. 645 (Texas).

The above decision would seem to be correct. There is, however, great conflict of authority upon the point. *Smith v. Clarke*, 21 Atl. Rep. 491 (N. J.), is a fair exposition of the opposite view. There the fact that the plaintiff would have been justified in resisting the arrest is held to show the arrest illegal. The answer given to this argument is that the cases justifying resistance to arrest where no warrant is exhibited, are all criminal, and that in them the *animus* of the prisoner is all-important. So that it may well be that an attempt to arrest without showing a warrant may justify resistance as affording reasonable grounds for supposing the attempt illegal, though in fact it is legal.

TORT — DUTY OF CARE TOWARDS A LICENSEE — NEGLIGENCE OF OWNER OF PREMISES. — The owner of premises left them open in such a way as to extend an implied invitation to the plaintiff to use a certain building. In passing to the building plaintiff fell into an excavation which defendant, the owner, had made in the path, and

which was negligently left uncovered. *Held*, that the defendant was liable for the injury, provided the plaintiff was using the premises in accordance with the implied invitation. *Phillips v. Library Co.*, 27 Atl. Rep. 478 (N. J.).

This case is entirely sound. The distinction between a mere licensee, or a licensee by sufferance, and an invited licensee, is well taken. Towards the former there is a duty in regard to the state of the premises to refrain from acts wilfully injurious. Towards the latter there is the added duty to inform him of any hidden defect or danger in the premises of which the owner has notice.

TORT — LIBEL — QUALIFIED PRIVILEGE. — An agent of defendant railroad company received a letter from attorneys putting in a claim for baggage of their client (plaintiff), lost by the railroad company. The agent in his answer to the attorneys charged their client with the larceny of the baggage. *Held*, such agent has, under the circumstances, a qualified privilege, and the company will be liable only on proof of malice or the absence of honest belief in the truth of the statements of the letter. *Alabama, &c. Ry. Co. v. Brooks*, 13 So. Rep. 847 (Miss.).

The opinion in this case is a concise and clear exposition of the reason for the doctrine of qualified privilege and of its extent. All that is necessary to entitle a communication, containing defamatory matter, to be regarded as privileged, is that the relation of the parties should be such as to afford reasonable ground for supposing an innocent motive for giving the information and to deprive the act of an appearance of officious intermeddling with the affairs of others. *Lewis v. Chapman*, 16 N. Y. 369. To be considered as privileged, however, the libellous matter must be consistent with the exigency of the occasion; this is clearly shown by Brett, L. J., when he says, "If the occasion is privileged, it is so for some reason; and the defendant is only entitled to the protection of the privilege if he uses the occasion for that reason." *Clark v. Molyneux*, 3 Q. B. Div. 237. As to the necessity of this doctrine of privilege, "if fairly warranted and honestly made, such communications are protected for the common convenience and welfare of society." Parke, B., in *Toogood v. Spyring*, 1 Crompt. M. & R. 181.

TORTS — PROXIMATE CAUSE — INJURIES CAUSED BY FRIGHT. — Plaintiff was standing on a crossing at the foot of a hill, waiting for a chance to go aboard one of the defendant's cars, which was stationed opposite her. While she stood there, a horse-car came upon her, driven downhill at such speed that before the driver could stop the horses, their heads were on either side of the plaintiff, who fainted from the fright and excitement. As the result of the shock she became ill, suffered a miscarriage, and was sick for a long time. *Held*, that the plaintiff may recover if her physical injury, though caused by the mental shock, was the natural result of the defendant's negligence. *Mitchell v. Rochester Ry. Co.*, 25 N. Y. Supp. 744.

For a discussion of this case, see the Notes.

TRUSTS — DISTRIBUTION OF ASSETS — UNJUST ENRICHMENT. — An insolvent corporation misappropriated funds belonging to the plaintiff, and used them to discharge its liabilities. The question was whether the plaintiff's claim should be preferred to those of the general creditors. *Held*, that unless property of the plaintiff had gone into the hands of the assignee in its original or in a substituted form, whereby the assets are so much larger, the plaintiff was entitled to no preference. *Slater v. Oriental Mills*, 27 Atl. Rep. 443 (R. I.).

In giving the opinion of the court, Stiness, J., says: "So long as he [the defrauded person] seeks to recover what he can show to be his own, he is in the position of an owner; but when he cannot do this, and seeks to recover payment out of the trustees' general estate, he is in the position of a creditor." That is to say, the plaintiff has no preference unless he can trace his property specifically or into its product. It is respectfully submitted that if that is the doctrine of the case, it is wrong. To support their view, the court make use of the following example, somewhat abbreviated here: D, an insolvent debtor, has assets equivalent to \$1000. His liabilities amount to \$2000, — one half due A, and the other half due B. If a distribution were made, A and B would get \$500 each. But suppose D collects \$1000 for F, which he misappropriates, and pays A's debts in full. Now, were F entitled to the entire amount of his claim, B would get nothing; therefore, the court argues, F's claim must not be preferred. But let us add one further fact, which may or may not have existed in the principal case, — that D finds it absolutely necessary to discharge A's claim, in order to maintain his credit, and that instead of taking his own property to pay A, he appropriates that of F. The result is that D has \$1000 which B. and F. claim. There would have been nothing left, unless D had stolen F's money; therefore, to give B one-half would allow him to reap the benefit of D's theft, at the expense of F, who never trusted D's solvency. F, therefore, should be paid in full.

In cases like this, where it is impossible to trace the assets, a just result cannot be reached without determining whether the debtor's assets are larger than they would have been had the misappropriation never taken place. In case they are, then the plaintiff deserves the amount saved to the estate by the use of his property; of course if the debtor wasted the property, the plaintiff has no preference. Such a question of fact would doubtless be very difficult to determine in many cases, but not more so than many others which come before a court. See Perry on Trusts, § 128, for the cases cited.

TRUSTS — PARTIAL ASSIGNMENT OF A CHOSE IN ACTION. — R. was indebted to plaintiff, and executed to him the following instrument: "I have in trust for [plaintiff] \$325, which money I have left at Messrs. C. & B." At that time C. & B. owed R. \$332. *Held*, that the instrument operated as an equitable assignment to the extent of \$325 of R.'s claim against C. & B., and the assignment secured the assignee against subsequent garnishee process by a judgment creditor of R., notice having been brought to the attention of the court before judgment was rendered in the garnishee process. *Stillson v. Stevens*, 23 S. W. Rep. 322 (Tex.).

This is a decision in a sound one, but it is to be regretted that the Texas court did not see fit to consider the true nature of so-called assignments of *chose in action* in general, and of partial assignments in particular. In early systems of law, *chose in action* were not transferable, since the consent of all parties to a contract was, as it is now, necessary to change any of the terms of the contract relation. But in time this rule of non-transferability came to be evaded by the appointment of an attorney who sued, for his own benefit, in the name of one of the parties to the contract. This appointment, unfortunately for the clearness and terminology of the subject, was called the assignment of a *chose in action*. In the Roman law it was the *procuratio in rem suam*. By this so-called assignment, the legal title to the *chose in action* does not pass, for the *chose in action* is not transferable; but the right of the assignee is a legal right, — a power of attorney to sue in the assignor's name for the benefit of the assignee. This right can be exercised perfectly at the common law, and is a thing of value, — a legal right of property. It is to be remembered, however, that the assignor, being the legal owner of the *chose in action*, has the power, though not the right, to release his contract claim; and if he is about to make such release, the assignee may resort to a court of equity for protection. Such being the true nature of a total assignment of a *chose in action*, it is clear that since a partial assignment does not operate as a power of attorney, the partial assignee has no remedy at law, although his rights are fully protected, almost everywhere, in equity. The position of a partial assignee is to be distinguished from that of one to whom a total assignment is made, partly for the benefit of the assignee, and in trust as to the residue for the assignor; such total assignment operates as a perfect power of attorney. The nature of a partial assignment which, as said above, gives the partial assignee an equitable interest only, has never been very clearly explained. It would seem to resemble an equitable charge more nearly than anything else; he who makes the partial assignment practically imposes a charge enforceable in equity upon the *chose in action* to which he retains title. The assignor is clearly not a trustee; there is no fiduciary relation between him and the partial assignee. The relation is one of an equitable right, but not of a trust. This view is made clearer, perhaps, by a comparison with the relation of an express trust. If, for instance, a partial assignor collects money which is the subject of the *chose in action*, he will hold it in constructive trust for the partial assignee. Had no such collection been made, the obligor would have fulfilled his duty by paying the partial assignee his proportionate part. On the other hand, where the relation is one of express trust, payment must be made to the trustee, and not to the *cestui*.

Authorities on this subject will be found in Ames' Cases on Trusts, 2d ed., pp. 59-76.

TRUSTS — PRIORITY OF NOTICE BY SUCCESSIVE ASSIGNEES OF AN EQUITABLE CHOSE IN ACTION. — A and B were trustees. The *cestui* made a settlement upon X, of which A alone had notice. The *cestui* then wished to suppress the settlement and mortgage her interest. The mortgagees, on inquiry of A as to incumbrances, received an evasive answer. B told them he knew of none. The mortgage was therefore completed, and notice was sent to A and B. A died without ever telling B of the settlement, and a new trustee was appointed in his place. *Held*, X should not be deprived of his priority over the mortgagees by the death of A, who at the time the mortgage was given by the *cestui* was in possession of notice of X's claim. *Ward v. Duncombe* (1893), App. Cas. 369.

For a discussion of this case, see the Notes.

TRUSTS — SUBSTITUTED TRUSTEE — DISCRETIONARY POWER. — Testatrix bequeathed a fund to her son upon trust to pay the income to her daughter Eva during

her life and "any portion of the principal of the said trust fund as it shall seem to him proper for her support and comfort." The trustee died. The court appointed a new trustee, who paid part of the principal to the daughter. *Held*, that since the deceased trustee had an imperative duty to provide for testatrix's daughter by using the power, it could be exercised by the trustee appointed by the court to succeed him. *Osborne v. Gordon*, 56 N. W. Rep. 334 (Wis.).

The decision must be approved, for it carries out the intention of the testatrix to make a provision for her daughter during her life. The case follows the authorities. See 1 Perry on Trusts, § 20.

REVIEWS.

CASES AND OPINIONS ON INTERNATIONAL LAW, WITH NOTES AND A SYLLABUS. By Freeman Snow, Ph. D., LL.B., Instructor in International Law in Harvard University. Boston: The Boston Book Co. 1893.

It has often been said that the free use of cases in the study of the law is only a single instance of the modern theory of teaching. The belief that *melius est petere fontes quam sectari rivulos* is of the essence of the modern spirit. Dr. Snow's admirable volume is a significant illustration of the truth of this view. The book contains the essential parts of the great cases on international law, and of the more famous opinions of the diplomatists who have dealt with it. Coupled with these are full references to the text-books of acknowledged authority. These references are systematically grouped under specific heads, and arranged in the order of topics. It is thus made possible, as Dr. Snow says, to compare the opinions of eminent writers, in many cases, "with the sources upon which they all rely." Dr. Snow's book is welcome, not only for itself, but also as an application of the "case system" outside the immediate influence of the Law School, and as an excellent illustration of what that system at its best really means.

E. B. A.

PARLIAMENTARY TACTICS FOR THE USE OF THE PRESIDING OFFICER AND PUBLIC SPEAKERS. Arranged by Harry W. Hoot. New York: Scientific Publishing Co. 1893; pp. 51.

This compact and elementary little manual of the rules of procedure in debating bodies aims solely at brevity and convenience. The rules are stated in their shortest form, with no attempt at analysis or discussion. The scheme of arrangement is simple and efficient. The questions of common parliamentary law are indexed on the right-hand margin of the book, in their order of precedence, and an inexperienced presiding officer can thus see at once, without turning a page, whether or not a given motion is in order. The book is so arranged that it can be carried easily in the pocket.

E. B. A.

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RESPONSIBILITY FOR TORTIOUS ACTS: ITS HISTORY.

Not infrequently do the records of the related laws serve as the sole resource, or the safest one, for a methodical explanation of dark and doubtful topics in the legal development of our own native system.

BRUNNER: *Deutsche Rechtsgeschichte*, i. 2.

“NO conception can be understood except through its history,” says the Positivist philosopher; and of no legal conception in Anglo-American law is this more true than of the notion of Responsibility for Tortious Acts. By this phrase is indicated that circumstance or group of circumstances attending the initiation and eventuation of an acknowledged harmful result, which induces us to make one person rather than another (or than no one at all) civilly amenable to the law as the source of the harmful result (and independently of whether this person can show some recognized justification for the harm); and it is this notion whose history we find it possible to trace back in a continuous development in our Germanic law, without a break, for at least two thousand years.

To get a starting-point, let us look back from present principles. The law to-day, so far as we are entitled to take it as standing on a rational basis, distinguishes classes of cases which may be roughly generalized for present purposes as follows: (1) Cases where the source of harm is pure misadventure, as where a cus-

tomers is handling a supposed unloaded gun in a gun-store, and it goes off and injures the clerk; (2) Cases where no design to injure exists, but a culpable want of care is found; (3) Cases where no design to injure exists, and yet no inquiry into the actor's carefulness is allowed, — in other words, where he does the specific harm-initiating act "at his peril," as where he fires a gun in the street, or cuts grass or sells goods which prove to be those of another; (4) Cases where actual design to produce the harm exists.¹ Now, the thing to be noted is that the primitive Germanic law knew nothing of these refinements; it made no inquiry into negligence, and it raised no issue as to the presence or absence of a design or intent; it did not even distinguish, in its earlier phases, between accidental and intentional injuries. The distinctions of to-day stand for an attempt (as yet more or less incomplete) as a rationalized adjustment of legal rules to considerations of fairness and social policy. But the indiscriminate liability of primitive times stands for an instinctive impulse, guided by superstition, to visit with vengeance the visible source, whatever it be, — human or animal, witting or unwitting, — of the evil result. Both these extremes are fairly clear; it is the transition from one notion to the other which forms the interesting and complex process.

In endeavoring to realize the nature of the primitive canons of Responsibility, one must take into consideration the essentially superstitious and irrational spirit which pervaded the jural doings of primitive society; for the notion here dealt with was only one of the vehicles of its expression. One need not here call to mind in detail the characteristics of primitive culture; only certain of the more germane may be noted. The idea of transgression as associated with ceremonial observances;² the propitiation of deities by gifts and sacrifices;³ the sense of pollution and contamination (as by the touching of blood or of a corpse);⁴ the appeal to a decision of the Deity or of chance in litigation (as by the subjection to ordeals, the swearing of exculpatory oaths, the

¹ Compare Holmes, *Common Law*, cc. iii., iv., esp. pp. 92 ff., 144 ff.; Pollock, *Torts*, p. 19. It is here assumed, for present purposes, that in the few classes of cases where actual malicious motive is material, no question of responsibility, properly considered, is involved.

² Spencer, *Ceremonial Institutions*, 10.

³ Tylor, *Primitive Culture* (3d Amer. ed.), ii. 380.

⁴ Tylor, *Ib.*, ii. 429.

engaging in formal combat);¹ the arbitrary formalism of words and phrases in pleading and oaths,²—these give the tone to the times. In the light of these it is easy to understand that the notion of Responsibility for Harmful Results was determined largely by instincts of superstition, and that our ancestors were satisfied with finding a visible source for the harm and following out their ideas of justice upon it.

In this particular field, too, there are numerous manifestations, all akin. The doer of a deed was responsible whether he acted innocently or inadvertently, because he was the doer;³ the owner of an instrument which caused harm was responsible, because he was the owner, though the instrument had been wielded by a thief;⁴ the owner of an animal, the master of a slave, was responsible because he was associated with it as owner, as master;⁵ the master was liable to his servant's relatives for the death, even accidental, of the servant, where his business had been the occasion of the evil;⁶ the *rachimburgius*, or popular judge, was responsible for a wrong judgment, without regard to his knowledge or his good faith;⁷ the oath-helper who swore in support of the party's oath was responsible, without regard to his belief or his good faith;⁸ one who merely attempted an evil was not liable

¹ Lea, Superstition and Force, *passim*.

² Brunner, Deutsche Rechtsgeschichte, i. 181, ii. 349; Wort und Form in altfranzös. Prozess, 1868; and Revue Critique de Legisl. et de Jurisp., 1871-72.

³ See *post*.

⁴ See *post*.

⁵ See *post*.

⁶ Brunner, Deutsche Rechtsgeschichte (1892), ii. 549. "The master was liable for the *wergeld* of the workman if the latter lost his life in the service, and for the appropriate money-payment if he was injured, — so far as the injury could not be imputed to some third person for whom the master (who had to answer for the misdeeds of his own people) was not responsible. If one who was in the service of another lost his life by misadventure, by reason of a tree or of fire or of water, the accident was imputed to the master as *homicidium*. If one person sent another away or summoned him on the former's business, and the latter lost his life while executing the order, the former was taken as the *causa mortis*." See LL. Henry I. 90.

⁷ Brunner, *Ib.*, ii. 360. "That the intention to act wrongfully is presumed as of course against the defeated party [in a suit against the judges], and, especially as regards the judges, that the excuse of having judged according to their best knowledge and belief is not allowed, is merely an individual application of a fundamental principle pervading the Germanic penal law, which is to argue without question from the particular external circumstance to the presence of an unlawful intent, and (apart from typical exceptions, not here involved) to treat unintentional misdeeds the same as intentional ones, without allowing proof of the absence of intent."

⁸ Brunner, *Ib.*, ii. 389. "The earlier times paid no regard to the good faith of the individual oath-helper, in accordance with their general principle of penal law, which

because there was no evil result to attribute to him;¹ a mere counsellor or instigator of a wrong was not liable, because the evil was sufficiently avenged by taking the prime actor,² and where several co-operated equally, a lot (frequently) was cast to select which one should be held amenable;³ while the one who harbored or assisted the wrongdoer, even unwittingly, was guilty, because he had associated himself with one tainted by the evil result.⁴ Of these various forms of the primitive notion which determined responsibility, we are here concerned with only a few, — those that have a more or less intimate connection with later doctrines of the English law of torts, and are therefore for us more worth tracing from early times.

These may be, for convenience, grouped into four classes, each one of which will be to better advantage followed out separately, — to be distinguished according as the harmful results may be traced back to (a) a personal deed; (b) an animal; (c) an inanimate thing; (d) a servant or slave. It will be convenient also to take up first the general Germanic notion, and follow it down to, say, the Norman Conquest, and then to keep to English soil, and trace down the later forms. As it happens, this division falls in fairly with epochs of doctrinal change. In this article, then, the idea will be taken up in its earlier forms only, as one common to the Germanic peoples.

without discussion treated the unlawful intent as accompanying the external fact of an offence. . . . The later development shows the tendency, on the one hand, to increase the punishment for a false oath, but, on the other hand, to distinguish between false oaths sworn wittingly and unwittingly." It may be suggested that when the learned investigator in these passages speaks, *e. g.*, of "treating the unlawful intent as accompanying, etc.," he is attributing to a past age the sentiments peculiar to the present one. The primitive Germans did not "presume" or "impute" an unlawful intent: they simply did not think of the distinction at all. To feel the need of such an element, and to "impute" or "presume" it, would be a mark of a later stage of development.

¹ Brunner, *Ib.*, ii. 558. "The penalty of unintentional misdeeds is paralleled by the general impunity accorded to attempts." Moreover, though certain acts which fell short of causing death, and yet put life in peril (as pushing into the water, etc.) were treated as lesser offences, somewhat as we treat attempts; yet "it was immaterial whether the result was caused with the intention of killing, or with some other design, or unintentionally" (560).

² Brunner, *Ib.*, ii. 565.

³ LL. H. I. 59, 25; Brunner, *Ib.*, ii. 468.

⁴ Brunner, *Ib.*, ii. 575. "From the jural notion that the misdeed in itself puts a man beyond the law, follows fundamentally the penalty of the act of rendering assistance. . . . [This notion] has to do with the idea that the helping of the offender is a mutiny against the common weal, or it springs directly from the principle that he who stands out for the wrongdoer takes upon himself, as against the community, the wrong-doing and its consequences."

I.¹

We have, then, to deal with the primitive notion which instinctively visits liability on the visible offending source, whatever it be, of a visible evil result. In Brunner's words, "The early law knows no such thing as accident, but seeks always for something to make answerable, and determines it, by a scarcely appreciable causation-nexus, from the conditions of the harmful result."² The notion, as applied to persons, is that of the *schädliche Mann*, a man from whom some evil result has proceeded.³ It can best be illustrated in advance by two instances, one drawn from a well-known tale in the Northern mythology, the other from mediæval Frisian chronicles:—

"Baldur the beautiful was beloved by all the gods, and Frigga had exacted an oath from all things—fire, water, stones, trees, and all—not to harm Baldur; for Baldur had dreamed of his own death. Then the gods, his safety assured, began in fun to pelt him with stones, clubs, and battle-axes, and found him indeed invulnerable. But Loki the jealous was vexed because Baldur was not hurt; and going in disguise to Frigga, he learned that the mistletoe alone had not been sworn, for it seemed too feeble a plant to do harm. Then Loki went up to Hodur, the blind god, who had been standing apart, for he had nothing to throw. He could not see to aim, so Loki gave him the mistletoe twig and guided his hand, and the twig flew, and struck Baldur lifeless. Then the other gods were for laying strong hands on the murderer; but they were in a sacred place. And Hodur fled. And Odin said, 'Now, who will wreak vengeance on Hodur, and send Baldur's slayer to Hades?' The avenger was Wali, Baldur's younger brother, who washed not his hands and combed not his

¹ NOTE. — This seems the best place to say, once for all, that the ensuing first part of the article is founded almost entirely on Prof. Dr. HEINRICH BRUNNER's article in the Proceedings of the Royal Prussian Academy of Sciences, vol. xxxv., July 10, 1890, "Ueber absichtslose Missethat im altdutschen Strafrecht." As to the sources there quoted, this part is in effect merely a reproduction of the salient ones. As to the conclusions reached, they have here been presented in a somewhat different form and arrangement, with a view to tracing subsequent English development; but it would seem that Professor Brunner would prefer this, for in his 1892 volume of the *Deutsche Rechtsgeschichte* he has chosen an arrangement more nearly resembling the present one. His article will here be cited as "Br., Pr. Ak.;" his treatise, as "Br., D. Rg." A few gleanings from recent volumes of the Selden Society, from Bracton, etc., have been added by the writer, so as to bring the topics in this part of the article down to about the 1200s in England.

² Br., D. Rg. ii. 549.

³ Br., D. Rg. ii. 537.

hair until he had fulfilled his vengeance and smitten to death the slayer of Baldur." ¹

A clearer case of innocence, one would think, in these days, could hardly be made out; but not so by the tests of our ancestors. — Next, an example showing an exceptionally late survival of these ideas, and at the same time the transition to different standards: —

"Owen Alwerk was brewing beer. During his absence the child of Swein Pons came in and stood by the kettle. The kettle slipped from its hook, and the liquid burned the child so that it died on the third day. The relatives of the child pursued Alwerk, who fled to the house of a friend for refuge. The master of the house opposed the entrance of the pursuers, and an affray ensued, in which the master by inadvertence killed his own nephew. The affair was laid before six men as judges; and they decided at first that Alwerk must pay the head-money for the dead child and for the dead nephew, and must besides make a pilgrimage to Rome. But Alwerk opposed the judgment, and to such good purpose that they altered it to this effect, — that he should be absolved without more from the child's death, and from the nephew's if he swore that he did not urge on the master of the house to fight." ²

With these preliminary illustrations of the attitude of mind we are dealing with, we may take up, in the order of topics already named, the primitive ideas for the exposition of which we are indebted to the great Brunner.

a. Harm connected with a Personal Deed.

It is not possible to draw hard-and-fast lines in tracing the stages of development; we can simply note that there were several stages, and point to particular rules or passages as illustrating approximately this or that successive form.

I. Of the primitive form of absolute liability, then, we find a few comparatively late traces; though, as Brunner points out, the fact of the necessity for an express mention of a prohibition or

¹ In Bugge, *Norrven Fornkvaedi* (Christiania, 1867), p. 212, is another instance, from the Song of Sigurd, the slayer of the dragon Fafnir. Loki, in company with Odin and Honir, had seen an otter and killed it with a stone; for it had been carrying off the pelts belonging to the gods. But they discovered that the supposed otter was none other than the son of Hreidmar, who had put on the form of an otter; and, for the compensation they were obliged to give, they filled the otter-skin within and covered it without with gold, and gave it to Hreidmar.

² A. D. 1439, Richthofen, *Friesische Rechtsquellen*, 570.

a penalty in a law is often an indication that the popular regard for the principle involved is on the wane.

Lex Bavariorum, 19, 6. — "Who injures the corpse of a man whom another has killed, either by cutting off the head or the ear or the foot, or by otherwise drawing the slightest blood, pays a fine of twelve shillings." The example then given is this: The corpse of a murdered man is discovered by birds of prey, who settle upon it to devour it; a man sights them and draws bow at them, but strikes the corpse so that it is wounded: he shall pay the fine.

Westgothic Law.¹ — The rule of Wamba: "Ut quicumque deinceps occiderit hominem, si volens aut nolens homicidium perpetravit, . . . in potestate parentum vel propinquorum defuncti tradatur."

Roger of Sicily's Law (1100-1150).² — "Qui . . . lapidem ad aliud jecit hominemque occidit, capitali sententia feriat." The notable thing is that the first part of the law is a copy of the *Lex Cornelia de sicariis*; but liability is substituted for non-liability, and the above is added.

Anglo-Saxon Law. — (1) Beowulf (Chronicles) v. 2436 (ed. Heyne): the story of King Hredel, whose second son, Haedcyn, unfortunately killed his brother by an arrow which went wide of the mark. The death of the slayer was required in expiation; and the king so mourned at the untimely loss of his two sons that he took his own life. (2) LL. Henry I. (so called) 90, 11: "Legis enim est, qui inscianter peccat scienter emendet, et qui brecht ungewealdes [unintentionally] bete gewealdes, . . . [e.g.] si alicujus equus, ab aliquo stimulatus vel subcaudatus, quamlibet percuciat."³

¹ Walter, *Corpus Jur. Germ.*, i. 668. The general dates of these Germanic codes vary from 400 to 900 A. D. circa. The large collections usually referred to are Mon. Germ. Leg., and Schmid's *Gesetze d. Angels.*; others are noted in Br., D. Rg., I. vii.

² Merkel, *Commentatio*, 1856, p. 31, fragm. 42.

³ It must be remembered that we are here dealing with a sentiment characteristic of primitive justice everywhere. For the Greek and Roman evidences, see Hepp, "Die Zurechnung auf d. Gebiete d. Civilrechts," 1838. The following casual examples, as cited by Blackstone (iv. 187), may here be given: —

ek: Patroclus tells Achilles, in the latter's dream, that when a child he was obliged to flee the country for casually killing a playfellow, *ἡπίος οὐχ ἐθέλων* (Iliad, xxiii.). Voluntary banishment for a year was the penalty for homicide by misfortune (Plato, *Laws*, ix.).

Roman: Casual homicide was excused only by the indulgence of the emperor, certified by his own signature (Cod. 9, 16, 5).

Hebrew: "As when a man goeth into the wood with his neighbour to hew wood, and his hand fetcheth a stroke with the axe to cut down the tree, and the head slippeth from the helve, and lighteth upon his neighbour, that he die; he shall flee unto one of those cities [of refuge], and live." But the avenger might slay him on the way, or on his withdrawal from the city at any time before the death of the high priest (Numbers xxxv. 26; Deut. xix. 5).

It may be noted here that the proceeding of attainr was only a later form of the same early notion. In early times it was a general custom, where adultery or the like was discovered, to slay every living thing within the house, whether man or beast.¹ The legal visitation of the sins of the fathers upon the children was one of the latest survivals of this idea.²

2. As times change, and superstition begins to fade, the notion of "misadventure," "ungefähr," is hazily evolved, and facts of the sort are regarded as ground for an appeal to the king or the lord on the offender's behalf. The strict law is thus regarded as requiring his punishment; but no vengeance can be wreaked upon him, no blood-feud started by the members of the victim's family.

Holland. — In 1425 Aelwyn, a citizen of Delft, had "by ongevallende ende onwetende" ³ killed another. The case went to the lord, Philip of Burgundy, who granted a pardon: "We hold the said Aelwyn quit and forgiven by this letter of all wrong and misdoing which he has done against us and our lordship, and we give him again his life and goods, which he thereby should have forfeited to us."⁴

France. — (1) *Coutumes du Beauvoisis*: ⁵ "In case of accidents happening by mischance, in such cases *pités et miséricorde* ought rather obtain instead of stern justice." When a man in turning his wagon injures another, "it is a case of mischance, and the wagoner should be shown mercy, if it does not appear that he managed it with a malicious purpose of injuring the other." If one is separating two quarrellers, and accidentally injures the one who is his friend, "let mercy be shown him." (2) *Somme Rurale*: ⁶ Under the head "d'occire autre par cas d'aventure," all such cases are said to fall under the penalty of death, and to need remission by the prince.

England. — (1) Anglo-Saxon laws, quoted *post*. (2) Bracton, *De Legibus*: "Crimen homicidii, sive sit casuale vel voluntarium, licet eandem

¹ J. Grimm, in *Zeitsch. f. deutsches Recht*, v. 17, 18.

² Bracton says (f. 105 b): "Crimen vel poena paterna nullam maculam filio infligere potest;" but this is a borrowed humanity, and does not represent the actual law of his time. By the Golden Bull of Charles IV. in 1356, the lives of the sons of such as conspire to kill an elector of the Imperial Crown are spared by the Emperor's particular bounty; but they lose all rights of succession and of holding office, "to the end that, being always poor and necessitous, they may forever be accompanied by the infamy of their father, may languish in continual indigence, and may find their punishment in living and their relief in dying." In Blackstone's time this corruption of blood still existed, though he disparages it; but the forfeiture of estates he defends on grounds of policy.

³ "By accident and unwittingly."

⁵ Beaumanoir, c. 69.

⁴ Groot, *Charterbuch*, 4. 800.

⁶ Bouteiller, ii. 40.

poenam non contineant, quia in uno casu rigor, in alio misericordia" (f. 104 b; also 141 b). (3) Stat. Gloucester (6 Ed. I., 1278) c. 9: If one kills another in defending himself or by misadventure, he shall be held liable, but the judge shall inform the king, "*et le roy lui en fera sa grace, s'il lui plaist.*" (4) Fleta¹ repeats the rule of the statute. (5) Early cases in the King's Court: (1214) "Roger of Stainton was arrested because in throwing a stone he by misadventure killed a girl. And it is testified that this was not by felony. And this was shown to the king, and the king, moved by pity, pardoned him the death. So let him be set free."² (1225) "Mabel, Derwin's daughter, was playing with a stone at Yeovil, and the stone fell on the head of Walter Critelle, but he had no harm from the blow; and a month after this he died of an infirmity, and she fled to church for fear, but [the jurors] say positively that he did not die of the blow. Therefore let her be in custody until the king be consulted."^{3, 4}

It is to be noted that a killing done in self-defence was regarded as one of those which required to be pardoned in this way by the king; and this notion long left its impress on English criminal law.⁵

Early Cases. — (1221) "Howel, the Markman, a wandering robber, and his fellows assaulted a carter and would have robbed him; but the carter slew Howel, and defended himself against the others and escaped them. And whereas it is testified that Howel was a robber, let the carter be quit thereof. And note that he is in the parts of Jerusalem, but let him come back in security, quit as to that death."⁶ Note that there is here no resort to the king's pardon, yet the carter had thought it wise to seek safety by absconding. — (1203) "Robert of Herthale, arrested for having in self-

¹ i. 23, 15.

² Selden Society, Pleas of the Crown, i. No. 114.

³ *Ib.*, No. 188. See also Bract. N. B. iii. 157, No. 1137 (A. D. 1235-36), where "*nescitur adhuc utrum ipsum interfecit per infortunium vel alio modo,*" and so the defendant is allowed to abjure the kingdom.

⁴ Bracton, in *De Legibus*, as above, shows the rule. But other passages there occur which are quite inconsistent with this, and would even do well enough as a rough statement of to-day's law. Of homicide by chance, he says, "as where a person has thrown a stone at a bird or an animal, and another person, passing unexpectedly by, is struck and dies, . . . here it is to be distinguished whether the person was engaged in a lawful or in an unlawful affair. . . . If he was engaged in a lawful affair, . . . if he used such care as he could, . . . it is not laid to his account" (120 b). Again, he uses the old Roman example of throwing a ball at play and hitting a razor in the hands of a barber while shaving (136 b). The explanation is simple: he is here copying and adapting from the Roman and civil law, — in the latter case from Dig. 48, 8, 14 (as Brunner points out); in the former from Gregory's Decretal (v. tit. xii.; 1234 A. D.) "*de homicidio voluntario vel casuali*" (as Twiss points out, Pref. II. lix.).

⁵ *Bl. Comm.* iv. 182-188.

⁶ *Seld. Soc., Pl. Cr.*, i. No. 145.

defence slain Roger, Swein's son, who had slain five men in a fit of madness, is committed to the sheriff that he may be in custody as before, for the king must be consulted about this matter."¹

3. But still, in the earlier days, the malfeasor by misadventure must at least pay a fine, though released from the penalty of death, and, later on, when the blood-feud had disappeared and a fixed payment was the regular form of civil liability, he must pay a portion of the ordinary amount.

Holland. — In 1438 Philip of Burgundy pardons by special grace the members of a guild in Leyden who have killed some one by misadventure, remitting the forfeiture of life and goods, but saving the expiation-money due the dead man's kindred.²

Franks. — Capitulary of Charlemagne, 819 A. D., with instructions to the *missi*, or itinerant officials: As for a person held to answer, "let this be the treatment, that if one has offended ignorantly, let him not be obliged to pay according to the full rule, but as near as seems possible."³

England. — LL. Henry I. (so-called), 90, 11: After the maxim above cited, "*qui inscieniter peccat scieniter emendet*," and the illustrations of misadventure, "In these and like cases, where a man intends one thing, and another eventuates, *i. e.*, when the result, not the intention, is charged as blamable, let the judge fix a small fine and fee, inasmuch as it really occurred by accident."⁴

4. Moreover, probably at a somewhat later stage, as the notion of complete exculpation (in a criminal process) grows, the malfeasor

¹ Seld. Soc., Pl. Cr., i. No. 70. So also Bract. De Legib. 1446, mentioning a case of a pardon to a man who defended himself against a burglar in his own house (1234); Bract., Note-Book, iii. 229, No. 1216 (A. D. 1236-37), where the jury found a killing in self-defence, and "*dominus rex de gracia sua, non per iudicium, perdonavit ei mortem illam*" (1236); also Bract., N. B. iii. 107, No. 1084 (A. D. 1225). These were before the Statute of Gloucester (1278), cited above.

² Mieris, Handv. etc. d. Stad Leyden, 289.

³ Boretius, Cap. i. 290, Cap. Missorum, ch. 15.

⁴ In old Swedish law accidental killing is not to be punished unless both parties (*i. e.*, the deceased's relatives, practically) wish it (v. Amira, Altschwed. Oblig.-recht, 382). So in Japan a case is recorded (Simmons, Notes, etc., Trans. As. Soc. 'Jap., xix.), where the judge labors to induce the deceased's family to withdraw their charge against an insane murderer, and finally succeeds. This is probably the transition-form preceding the above stage; first, the family agree to compound for less money, and then the judge compels them to. A curious example of this phase is seen in the LL. Henry I.: where a man falls from a tree and kills another below, he shall be held innocent; yet the blood-feud will be allowed if insisted upon, but it may be carried out in one way only, — the avenger may himself mount the tree, and in turn fall upon the slayer. This is recorded also in Holland (Brieler Rechtsbuch, Matthijssen, 212), and in a Hindu popular tale (Kohler, Shakspeare in d. Forum d. Jurisprudenz, 93).

must, immediately after the occurrence, give notice of it, and swear an extra-processual exculpatory oath as to its occurring by accident or in self-defence; otherwise, he loses the benefit of the plea if suit is brought.

Franks. — Lex Ripuaria, 77: When a man slays a malefactor, *flagrante delicto*, who has resisted capture, he must make oath with eleven helpers that he slew the other as an outlaw; if he does not, "Homicidii culpabilis judicetur." Then afterwards he must come to his trial within forty nights, and make oath with thirty-six law-men.

Sweden. — The wrongdoer by misadventure, without waiting for suit, must offer an oath and render satisfaction for the deed.¹

Holland. — The oath of exculpation for the death of a servant declared that it happened "by his self's fault and by misadventure, and without deed of his."²

In the thirteenth century, then, in England we find the primitive notion still living; in cases of homicide, at least, the slayer forfeited goods and paid some fine or fee to the king in a criminal process, and in probably all torts the harmdoer paid some compensation to the injured party.³

We leave this topic at this stage, and turn to —

b. Harm connected with Animals.

The successive phases of development are nearly akin to those already considered.

1. Of the primitive idea of full liability for harm caused by one's animals, there are a few traces.

*Sachsenspiegel*⁴ speaks of complete liability being the ancient rule, "quantum si facinus in persona propria commisisset."

2. In the next phase, the injured party is found without the privilege of carrying out the blood-feud; this recognition of the unintentional nature of the deed seems to have come earlier here than in any other class of cases. But the owner is still answerable for the *wergeld* or the *compositio* appropriate to the harm done, —

¹ v. Amira, *Altschw. Oblig.-r.*, 379.

² Brieler *Rechtsbuch*, Matthijssen, 210. So also, in maritime law, for a death on shipboard. Fruin, *De oudste Rechten d. Stad Dordrecht* (1882), ii. 52, No. 70; i. 235, No. 79; and R. Wagner, *Handbuch d. Seerechts*, i. 399.

³ For some cases of "misadventure" not particularly significant, see *Seld. Soc.*, *Pl. Cr.*, i. Nos. 81, 132, 156, 203.

⁴ Landr., ii. 62, Sunesen, 55.

by most laws for the full sum, by others for an aliquot part; and in many cases the value of the mischievous animal, if surrendered, can be used in reduction of this sum.

The full sums were required by the early Lombards,¹ the Anglo-Werini,² and the Saxons;³ the Alamanni⁴ required it for injuries by horses, oxen, swine, but one half only if by others; the Frisians⁵ required one quarter only. The Salians (early period)⁶ and the Ripuarians⁷ required the whole, but allowed the animal to go for one half. The later Lombards required one half.⁸ These rules may be traced in much later records of those regions.⁹

The next step is to absolve the owner entirely, if he divests himself of all relation with the accursed thing by putting it from him entirely; and this would take place, (1) in the beginning, by handing it over to the injured party for the infliction of vengeance (or, as above, in time, as in some sort a compensation or perquisite), and (2), later, by merely turning the animal loose.

(1) *Lex Visigoth.*¹⁰ — The animal is delivered "ut eum occidat."

*LL. Alfred.*¹¹ — (871-901) "If a neat wound a man, let the neat be delivered up or compounded for."

*Fitzherbert.*¹² — (1333) "If my dog kills your sheep, and I, freshly after the fact, tender you the dog, you are without recovery against me."

(2) *Flanders.*¹³ — (1241, 1264) The owner is not liable if he "expellet et abneget" the animal.

*Poitou.*¹⁴ — The owner is freed if he "désavouer" the animal; and he is bound if he takes it back again.

*Norway.*¹⁵ — The owner is free if he "von der hand sagen" the horse, swine, ox, or dog; otherwise he is liable as if the murderer.

The owner would thus not be liable if the animal had escaped; for he is no longer connected with it, he is absolved.

¹ Rothar, 326-8, 330.

⁴ Pactus Alam., iii. 17.

⁷ Lex Rip. 46.

² Lex Ang.-W., 52.

⁵ Lex Fris. Add., 3, 68.

⁸ See note 1.

³ Lex Sax., 57.

⁶ Lex Salica, 36.

⁹ Etablissemens de St. Louis, i. 125; Warnkönig, Flandrische Rechtsgesch., ii. 2, 226 (1265). In Pact. Alam., where a dog bit to death, the half *wergeld* was allowed; yet the avenger might demand the whole, on condition that he should suffer the dog's dead body to hang in his doorway till it rotted away (iii. 16).

¹⁰ Lex Visig., 8, 4, c. 20. *Accord.*, Schwabenspiegel, Lassberg, 204.

¹¹ C. 24.

¹² Abridgm. Barre, 290.

¹³ Warnkönig, Flandr. Rechtsg., ii. 2, No. 222; iii. No. 166.

¹⁴ Livre des droiz et des commandemens, c. 871.

¹⁵ Brandt, Vorlaesinger over d. Norske Retshistorie, ii. 46.

*Twisden, J.*¹ "If one hath kept a tame fox, which gets loose and grows wild, he that hath kept him before shall not answer for the damage the fox doth after he hath lost him, and he hath resumed his wild nature:" this seems to be a trace of the early notion.²

Moreover, the notion that the owner is liable if he harbors or takes the animal back after repudiation,³ became, when rationalized as time went on, one of the sources (apparently) of the *scienter* rule in English law.

It must be added that the idea of receipt by the opposite party for the purpose of wreaking private vengeance was largely supplanted by the idea of forfeiture to the authorities for public punishment: sometimes the animal was outlawed, and could be killed by any one;⁴ later he was forfeited to the lord or to the church.⁵

4. Along with all this we find in various regions in later times the requirement of an exculpatory oath as a preliminary to allowing the owner to free himself by giving up the animal. The oath perhaps at first declares merely that the owner was not privy to the wrong; but later it is that the owner was not aware of the animal's vice.

*Lex Salica.*⁶ — "Per lege [oath] se defendere potest, ut nihil pro ipso pecore solvat."

Livre des Drois, etc.⁷ — "Celui a qui le beste sera est tenu de amender le dommage au blécié; et si ne fera amende a justice, par quoy il ose

¹ *Mitchel v. Alestree*, 1 Vent. 295 (1676).

² For further traces in later times, see *Holmes, Common Law*, 22.

³ *Poitou, supra*; *Sachsenspiegel*.

⁴ *Bouteiller, Somme Rurale*, i. 38; *Magk* (Norway), in *Paul's Grundriss d. germanisch. Philol.*, ii. 1, 120; *Andrese, Stadregt v. Vollenhove*, i. 316. There is running down till a fairly late period the idea of taking vengeance on the accursed thing, just as against human beings. The animal was "condamné en exil." There was a special procedure against animals (just as against slaves) in many parts. Joined with this idea of expiation was, as Mr. Justice Holmes aptly suggests, apparently a mere sense of anger: "the hatred for anything giving us pain, which wreaks itself on the manifest cause, and which leads even civilized man to kick a door when it pinches his finger, is embodied in the *noxæ deditio* and other kindred doctrines of early Roman law" (*Common Law*, 11). For Roman and Greek illustrations, see that passage. But the sentiment which ultimately grew up may be early seen in scattered passages: "Car bestes mues n'ont nul entendement, qu'est biens ne quest maus" (*Beaumanoir*, 6, 16).

⁵ *Etablis. de St. Louis*, i. 125; *Coutumes de Touraine-Anjou*, 114; *Livre des droiz*, etc., 119; *Bouteiller, Somme Rurale*, i. 37; and elsewhere.

⁶ C. 36 (later texts).

⁷ C. 114; *Etabl. de St. Louis*, i. 125; *Bouteiller, Somme Rurale*, i. 38 (where the owner had been warned by the local authorities).

jurer qu'il ne sceust la teiche de la beste [that he did not know the vice of the animal]."

Flanders (1241).¹ — The owner is not liable unless the animal has for at least two days shown "manifestae noxae."

From this basis (and perhaps that just mentioned) the later doctrines of *scienter* in cases of violent injuries, were easily worked out.

c. Harm connected with Inanimate Things.

Here we may trace, *mutatis mutandis*, stages of development substantially analogous to those found in the preceding class of cases.

1. Of the most primitive form, subjection to the blood-feud for injuries caused by things belonging to a person, and without the owner's personal use of them, there are only a few traces, for the change came early.

In early times,² when rape or adultery was committed in a house, its inmates were killed, and the house (of commission or of refuge) was destroyed.

2. This passes into a mere pecuniary liability, accompanied sometimes by the duty of handing over the injuring thing, sometimes by the privilege of using its surrender to reduce the amount of the payment.

*LL. Henry I.*³ — A fine was imposed "si alicuius arma perimant aliquem ibidem posita ab eo cuius erant."

*Schleswig.*⁴ If one is building a house, and a beam falls and kills a man, the beam is to be given over to the dead man's heirs (or, by later law, merely thrown away), and the owner also pays them 9 marks.

3. The notion of complete exculpation by a surrender or repudiation of the offending thing, or by an abstention from using it again, very early makes its appearance.

*Lex Rip.*⁵ — "Si quis homo a ligno seu a quolibet manufactile interfectus, non solvatur,⁶ ni forte quis⁷ auctorem interfectionis in usus proprios adsumperit; tunc absque frido culpabilis judicetur."

Schleswig. — In the case above, if the beam is built in after all, the whole house is forfeited.

¹ *Ubi supra.*

² J. Grimm, in *Zeitsch. f. deutsches Recht*, v. 17-18.

³ C. 90, 11.

⁴ Thorsen, *Jutish Town Laws*, 19, 49, 75, 192.

⁵ C. 70, 1. This is found in almost the same words in *LL. Henry I.*, 90, 6.

⁶ No payment need be made.

⁷ Observe that *any* one who uses them is liable.

Norway.¹—A traveller speaks of seeing sickles, axes, and the like, with which men have been killed, lying about abandoned and unused.

LL. Henry I.²—The owner of weapons used by another to do harm must not take them into his hands again till they are “in omni calumpnia munda.”

The notions with regard to the forfeiture of such noxal things passed through phases similar to those respecting animals; and the “deodand” is one of the traces in later law.³

4. In some cases the feature reappears (along with the principle of exculpation by surrender or repudiation) of a preliminary exculpatory oath.

LL. Henry I.⁴—Where a man puts down his arms somewhere, and another takes them and does harm with them, or where he has left them with a polisher or a repairer, and the like happens, the owner must free himself by oath.

5. Finally, but coming at different times with respect to different classes of things, we find something approaching a rationalization of the rules. In some clear cases there is an absolute exculpation, without more said; in others, there is a foreshadowing of a test of due care or the like.

Lex. Burg.⁵—It is found necessary to say that if a lance or other weapon is stuck in the earth, and a man or animal chances to trip on it, the owner need not pay.

Lex Sax.⁶—Payment must be made, where injuries occur from ditches or traps, “a quo parata sunt.”

Lex Anglo-Wer.⁷—“Qui machinamentum fecit, dampnum emendet.”

LL. Alfred.⁸—Where a man is injured by a spear in another’s hand, he is liable “if the point be three fingers higher than the hindmost part of the shaft; if they be both on a level, . . . be that without danger.”

Sweden.⁹—At first the owner, but afterwards the user, of the noxal instrument must respond.

¹ Liebrecht, *Zur Volkskunde* (1879), 313.

² C. 87, 2.

³ Holmes, *Common Law*, 25, citing, among other cases, “If my horse strikes a man, and afterwards I sell my horse, and after that the man dies, the horse shall be forfeited” (Plowden, 260).

⁴ C. 87, 2.

⁵ C. 18, 2, and see *LL. Henry I*, 90, *passim*.

⁶ C. 58. Cf. also *Lex Rip*. 70, 2: “Si quis autem fossam vel puteum fecerit, seu pedicam vel balistam incaute posuerit, . . . culpabilis iudicetur.”

⁷ C. 61.

⁸ C. 36.

⁹ v. Amira, *Schwed. Obligationsr.*, i. 386.

*France.*¹ — When a man is killed during the erection of a house, neither the structure nor the master shall bear any liability, if a warning notice had been given.²

d. Harm connected with a Servant.

1. There was certainly a time when the master bore full responsibility for the harmful acts of his serf or his domestic. It is worth while to emphasize this by quoting passages from Professor Brunner's chapter on "territorial lordship,"³ his name for "the sum of the rights exercised by the lord over the tenants." —

"As regards the origin of territorial lordship, we have to distinguish in the Frankish empire a lordship by Germanic law and one by Roman law. The starting-point of the former is the responsibility of the lord for his people. According to Germanic law, as above remarked, the house-master was responsible to third persons for those attached to his house. This responsibility extended not merely to bondsmen, but also to half-free and free persons. If a free but landless man remained for some time in the house of another, he acquired a relation of dependency which established the responsibility of the house-master. . . . The liability of the master extended not merely over bondsmen living in the house, but over those settled on the land, and even over those elsewhere, so long as the master kept his ownership and no third person became responsible by receiving the man. . . . The responsibility of the master for free persons extended at least to those living in his house, followers and vassals not excepted. How far it extended without the circle of actual members of the household is doubtful. . . . For misdeeds of the bondsman the master originally bore full responsibility towards third persons. He had, as the party to the suit, to represent him and to render satisfaction for him. . . . The responsibility for free persons shows itself in the form of a duty upon the master to answer for the freeman's misdeeds."⁴

2. This responsibility disappeared in the case of freemen, as time went on, so that the master could relieve himself by handing them over to the regular courts; and this apparently worked a

¹ Bouteiller, *Somme Rurale*, i. 39.

² But as late as 1466 a counsel thus argued in England: "If I am building a house, and when the timber is being put up a piece of timber falls on my neighbor's house and breaks his house, he shall have a good action, etc.; and yet the raising of the house was lawful, and the timber fell, *me invito*, etc." (Fairfax, in the Thorn-cutting case, *V. B. 6 Edw. IV.* 7, pl. 18).

³ *Deutsche Rechtsgeschichte* (1892), ii. § 93; see also i. 71, 98.

⁴ Further references are: Meyer, *Zeitsch. f. Rechtsges. german.*, Abth. ii. 94; Leseur, *Rev. hist. du droit franc. et étrang.*, 1888, p. 576; Jastrow, *Strafrechtl. Stellung d. Sklaven in Deutschl. u. Anglo-Sax.*, 1878.

complete discharge. But in the case of serfs and domestics, the effect of a surrender was at first merely to relieve from the blood-feud and from the payment of peace money; it put the situation on the footing of a "misadventure," as then conceived, *i. e.*, it left the master liable to pay compensation-money.

1. *Kent Laws*.¹ — "If any one's slave slay a freeman, whoever it be, let the owner pay with a hundred shillings, give up the slayer, etc."

Lex Anglo-Wer.² — "Omne damnum quod servus fecit dominus emendet."

3. Then comes the usual step of allowing the value of the surrendered slave to be set off, and finally of complete exoneration by surrender of the slave; at first to the injured family, then generally to the courts for justice to be done.

Lex Salica.³ — The master pays one half the *wergeld* and, for the other, surrenders the slave.

Laws of Ine.⁴ — "If a Wessex slave slay an Englishman, then shall he who owns him deliver him up to the lord and his kindred, or give 60 shillings for his life."⁵

LL. William I, c. 52. — "All who have servants are to be their pledges; if any such [servant] is accused, they [the masters] are to have him before the hundred for trial. If in the mean time he flees, the master shall pay the money due."⁶

4. And, accompanying the later form (complete exoneration), the master must usually swear an exculpatory oath denying any connivance with the deed; for the exoneration presupposes that the master had no part in the deed.

Chilperic.⁷ — "Tunc dominus servi, cum VI [hominibus], juramento [affirmet] quod pura sit conscientia sua, nec suum consilium factum sit nec voluntatem eius, et servum ipsum det ad vindictam."

¹ Thorpe, i. 27, 29.

² C. 59.

³ 35, 1; 35, 5. *Accord*. Pactus Alam. iii. 17; *Lex Fris.*, i, 13 (slave for one third); *Lex Bavar.*, 8, 2, 89 (for 20 s.).

⁴ *Laws of Ine*, 74.

⁵ The slave might, in a few communities, merely be set free (as with animals) and the responsibility thus disclaimed; but this was forbidden by a Carolingian capitulary as against peace and order, and persisted only in South France (*Br.*, *Pr. Ak.*, 332). As in the case of animals, the giving of nourishment after the deed was equivalent to a sanctioning by harboring (*Br.*, *Pr. Ak.* 833).

⁶ *Bract*, *De Legibus*, f. 124 b, *accord*.

⁷ *Edict*, *Chilp.* c. 5.

*Lex Sax.*¹—He gives up or sets free the slave, and swears "se in hoc non conscium esse."

In Norman England we find this notion, "se hoc non conscium esse," "pura conscientia," "nec suum consilium . . . nec voluntatem eius," distinctly reappearing in the idea that it made a difference whether the master consented to or commanded the harm done by the servant or other member of his household. But it is necessary, before risking a generalization, to set forth the available evidence.

Seld. Soc., Manorial Courts, i. 8 (1246).—"Isabella Peter's widow is in mercy for a trespass which her son John had committed in the lord's wood."

P. 9 (1247): "Roger the Pleader is at his law against Nicholas Croke, [on the issue] that neither he [Roger] nor his killed Nicholas' peacock."

P. 17 (1248): "Hugh of Stanbridge complains of Gilbert Vicar's son and William of Stanbridge that the wife of the said Gilbert, who is of his [Gilbert's] mainpast,² and the said William unjustly, etc., beat . . . And Gilbert and William come and defend all of it fully."

P. 96 (1279): "They say that the ploughman of Sir Ralph Rastel beat and ill-treated John Scot. . . . And one Thomas, the servant of the said Sir Ralph Rastel, by way of objection said that . . . the said John Scot beat and ill-treated the said ploughman. . . . The jurors say that J. Scot did not beat [the ploughman]. . . . Therefore the said Thomas is in mercy, 12 d."

Seld. Soc., Manorial Courts, i. 149, 153, 154.—Court of the Fair of St. Ives (1275), Saturday, May 11: "Hugh of Swinford comes and complains of Thomas of Toraux, the Canvasser. . . . And the said Thomas comes and is charged and convicted of having by [his servant] Simon the Blake of Bury sold canvas by a false ell in his booth. And R. B., R. P., and J. G.³ are associated with him in that booth." . . . Wednesday, May 15: "Let all the merchants . . . be summoned to come to-morrow before the steward to adjudge and provide that Thomas of Toraux, R. B., R. P., and J. G., merchants selling canvas, have justice and equity in the matter of Simon the Blake of Bury, servant of said Thomas and his fellows, who was found in their booth measuring canvas with a false ell and selling it. Pledge for Thomas' appearance, all his goods." . . . Thursday, May 16: "For that Simon the Blake of Bury was found, etc., . . . the said merchants as well as the said Simon were accused as consenting to the said

¹ C. 18. *Accord. Lex Fris.*, i, 73; Knüt, p. 75; *Lex Alam.* 78, 6; Roth. (Lombards) 264, 342; *Lex Salica*, 35, 5 (later texts).

² Household.

³ Abbreviations are here made where feasible.

iniquity, and the said Thomas and his fellows named above have offered to prove . . . that they are not guilty thereof . . . and for that the said Simon confessed . . . it was ordered that his body be arrested. . . . And the said merchants give 40s. to the lord for his grace and favor."¹ In a later suit (p. 155) by Simon's lawyer, it appears that Simon "confessed in full court that he received the said rod by the hand and bailment of one Thomas of Toraux, merchant of Rouen, whom he thereof vouched to warranty," and that he was "not to withdraw himself from his plaint, but was to press his suit against the said Thomas;" yet he did withdraw his voucher.

Seld. Soc., Court Baron, 36 (1250-1300 A. D.).—William of Street's Case: Charge against one who sent his son in to take fruit from the lord's tree; denial that the son ever did so at his bidding: "William (saith the steward) at least thou canst not deny that he is thy mainpast,² nor that he was seized in the lord's garden . . .; how wilt thou acquit thyself that thou didst not make or bid him do this?" "Sir, for the deed of my son and the trespass I am ready to do thy will, and I ask thy favor. My pledges are etc." "But how wilt thou acquit thyself of the sending and bidding?" "In such wise, sir, as this court shall award that acquit myself I ought."

P. 38: William Lorimer's Case; charge of sending two men to cut stubble in E's field; denial, "never did such persons by his sending or bidding cut the stubble of that place nor carry it thence." So also Walter Coket's Case, p. 39. In another case of William Lorimer's, p. 55, he answers, "to prove that never did my folk, J. and T. by name, cut the stubble of that place by my commandment, nor carry it off, I am ready, etc." But in an alternative version, he denies that J. and T. were his mainpast, alleging that they were only laborers hired from day to day. Apparently either defence was good.

P. 53: "William of E., thou art attached to answer in this court wherefore thy son who is thy mainpast entered the lord's garden over the walls, etc. . . . Sir, [to prove] that never was any manner of fruit carried off by me, I will do whatever this court shall award that do I ought. — William, at least thou canst not deny that he was found inside and carried off divers kind of fruit at his will. — Sir, 't is true; wherefore I put myself in mercy."

Bracton, Note-Book. — II. 596, No. 779 (A. D. 1233): An assize of novel disseisin by Simon against John. J. did not come, but "William of L., his bailiff, came and said, for J., that if any disseisin was done it was not done by him, because he does not avow [*i. e.* sanction] the deed, nor, if it was done by his men, did any one come to him to lay it before him

¹ It does not appear whether the merchants were found by the jury to have consented; but if the confession of Simon, as set forth in the next paragraph, was taken as true, then they must have so found. The accusation implies that consent was necessary.

² Household.

[*ostendere*] so that he might make amends [*corigeret*]." And Simon replies, and ends by saying that "he sent to John asking that he should make amends [*emendaret*] and he refused to make amends." Ultimately John wins, "because he did no disseisin."

Ib., II. 600, No. 781 (A. D. 1233): An assize of novel disseisin by Ralph Basset against the Abbot of Kirkstede, for ploughing over the line of their fields, which adjoined. The Abbot denies any disseisin, and says, "that if his lay-members did anything there, this is not by him, and if it were so [*i. e.* that they had done harm] and it had been laid before him, he would have caused amends to be made [*emendari*], but if anything was done it was not laid before him, and therefore he says that *he (ipse)* did no disseisin if any was done." Then Ralph answers "that the Abbot well knew of it and it was laid before him, and the grain was carried off to the Abbot's own grange." The jury find that the ploughs of the Abbot did plough two or three feet over the line; and "on being asked whether the Abbot knew of this, they say that they cannot tell, but they do know well that the monks and the lay-brethren of the Abbot were there to see that it was done [*ad visum faciendum*]; and since they did not lay it before the Abbot, the Abbot should fall back upon them [*capiat se ad eos*], for they ought to inform him of the affair. And because the jury say that the field was so ploughed and that there are no boundaries and that the Abbot last year had the grain carried off, it is adjudged that . . . the Abbot be in mercy; damage, 5s." The jury here were asked if the Abbot knew of the deed; yet he lost the case, though the jury could not tell; and the annotator (an early hand) writes on the margin: "Note that if one's bailiffs and servants do not lay it before their master that a disseisin has been done, the master is not excused though he says that he knew nothing of it, inasmuch as his men knew of it. So also of monks rendering obedience."

Ib., II. 471, No. 616 (A. D. 1231): In an action for taking the plaintiffs' nets and preventing them from fishing, the defendants are asked "whether they themselves avow [*i. e.* are ready to answer for] the taking, or whether they did the taking by authority of the Abbot of St. Edmund's, whose men they are, and they say that they took the nets of their own authority and avow the taking."¹

Bract., De Legibus. — f. 204 b: After dealing generally with the topic of disseisin, and passing to actions for disseisin by servants, he says: "But if they [the masters] have disavowed the deed of their men, and, when they shall have been sued in any respect by any man or in any mode, they shall not have made amends [*emendaverint*], they are still liable, so long

¹ Cf. also Br. N. B. III. 131, No. 1114 (A. D. 1234-1235), where the Prior of St. Swithin was summoned for having a gallows, etc., and violating royal privileges, and answered as to one charge, describing how the men of the place caught a notorious robber and murderer "*et illum suspenderunt*," but says "*quod factum illum non advocat*;" yet the defence was here insufficient, "*et Prior in misericordia*."

as they are present¹ and have freely placed themselves on the assize, although they are not named in the writ. But, if they shall have made amends for the deed of their men, whether before demand or after, as long as it was before the taking of the assize, they shall free themselves and their men from the penalty of the disseisin. But if the masters are occupied in parts remote, so that they cannot be made parties, and if they have not known anything about the disseisin, for this reason the assize² shall not be stayed." Here it seems that the avowal or disavowal affects merely the liability to a fine, and the duty to make compensation is assumed as invariable. Almost the same principles are further expounded at f. 171 *a* and f. 172 *b*. So also 158 *b*, as to distrainments by the servant of a lord: "It must be inquired of the master whether he has avowed the deed of his servants or not; and if not, then the master will have an opportunity to make amends; but if he has avowed it or has not made amends, he makes the wrong his own, if there was a wrong."

We see here going on the process of a general leavening by the principle of "*se hoc non conscium esse*;" and apparently we are safe in concluding that by the end of the 1200s the general civil rule was as indicated by Bracton's statement on the particular topic of disseisin. In other words, so far as any penal results were concerned, the master could pretty generally³ exonerate himself by pleading that he had not commanded or consented to the act;⁴ while nevertheless this was only a growing exception to a responsibility which the moral sense of the community was still inclined to predicate generally, and accordingly the liability to make good any harm done—*i. e.* the civil liability—still continued without regard to command or consent. As we shall see later, the test of command or consent was soon after extended generally to civil liability also; and even in the 1200s we seem to see it coming. Yet as that century was not thoroughly conscious of the distinctions "civil" and "criminal,"⁵ it can only be said that, at the point to which we have now traced the topic, we find that the test of command or consent was applied in some cases and not applied in others, the general notion being that absence

¹ In court.

² Against the servants.

³ But for some time exceptions remained: Fitzh., Abridgm., "Corone," 148 (1315).

⁴ This seems indicated by the questions of the steward in the Court Baron cases (with one exception) and the inquiry at the Fair of St. Ives; for in those cases the penal idea would apparently predominate.

⁵ Notwithstanding Glanvil's and Bracton's use of the terms "*placita criminalia*" and "*placita civilia*."

of command or consent excused from correctional or penal consequences.¹

In leaving these topics at this point, two things must be noted with reference to the sources from which we thus arrive at a knowledge of the root Germanic idea: (1) It is not an absolute and unvarying idea. It was not uniformly and invariably dominant, and there were of course exceptions more or less notable. Possibly one of these obtained in the case of fire kept in one's house and accidentally resulting in a conflagration;² this we shall consider later. But on the whole the popular ethico-legal sentiment was of the content above set forth. (2) The various stages of the idea's development, as already remarked, cannot be plainly

¹ The situation in the twelfth and thirteenth centuries is somewhat complicated by the responsibilities involved in the frank-pledge police regulations. But there can be no doubt on the evidence that there was a general Germanic notion of responsibility for servants, preceding and independent of the system of communal responsibility known as frank-pledge (whether it was or was not a direct successor of frithborg). This being understood, the authorities of the thirteenth century, rightly read, do not give us any reason to doubt that the responsibility for one's household was (though in actual content not dissimilar) in history and in popular feeling a distinctly different thing from the responsibility for one's neighbors in the tithing (frank-pledge). Thus Bracton (f. 124 b), after declaring that the tithing is not responsible for persons not required by law to be in frank-pledge, says that in such case that one shall be responsible in whose household he is, "*nisi consuetudo patriæ aliud inducat*," as in Hertford, where one is not responsible "*pro manupastu [household] suo*," unless by harboring an offender. Then, after describing the application of the rule to bishops, etc., and their duty to produce their servants to the court or pay a forfeit, he continues, "and so it shall be done for all others who are in anybody's household, because every man, whether free or serf, either is or ought to be in frank-pledge *or* in some one's household" (the italics are the writer's). He then reproduces the old Germanic ideas (LL. Hlothar and Eadric, c. 15) as to "household," — "receiving food or clothing from him, or only food with wages, . . . and according to ancient custom he may be said to be of one's family who has been given hospitality for three nights." (Cf. also Selden Soc., Pl. Cr., i. No. 55 (A. D. 1202): "William of Morton and Simon Carpenter are outlawed. . . . They were nowhere in frank-pledge, but servants of the Abbot of Woburn;" Bract., N. B. iii. 563, No. 1724 (A. D. 1226): "Henricus le Ireys captus . . . non est in decenna [tithing], nec habet dominum qui eum advocet, . . . suspendatur;" also Ib. ii. 116, annotator, and foot-note 1; Gneist, Const. Hist. Eng., i. 185; Bract., De Legibus, 153 b.) It seems clear, then, that there is nothing which should induce us to believe that the responsibility for servants was not a perfectly clear and natural one apart from frank-pledge. When we meet such expressions as "*omnes qui servientes habent, eorum sint franc-plegii*" (LL. Wm. I. c. 52; Thorpe, i. 487), and "if the servant of any lord . . . commits a felony, . . . [the lord] is to be amerced, and the reason is because he received him in bourgh [pledge]" (Fitzherbert, "Corone," 148), we see that we are dealing with expressions used either by way of analogy (the responsibility being in both cases practically the same) or at a later date in ignorance or in disregard of the former distinctions.

² Brunner, D. Rg., ii. 657-658.

pieced out for each of the Germanic communities; nor can it be asserted that for the whole race the development went on with any homogeneity of time and incident. What can be affirmed is merely that the idea, in the various communities and at various epochs, passed through stages such as those indicated.

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"MONOPOLY" UNDER THE NATIONAL ANTI-TRUST ACT.

I.

THE Anti-Trust Act, passed by Congress July 2, 1890, provides, among other things, as follows:—

"Sec. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States or with foreign nations, is hereby declared to be illegal.

"Every person who shall make any contract, or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

"Sec. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons to monopolize, any part of the trade or commerce among the several States or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

Seven offences are defined under these sections, to wit: (1) Contract in restraint of interstate or foreign trade or commerce; (2) Combination in the form of trust or otherwise in restraint of such trade or commerce; (3) Conspiracy in restraint of such trade or commerce; (4) Monopoly of any part of such trade or commerce; (5) Attempt to monopolize any part of the same; (6) Combination to monopolize any part of the same; (7) Conspiracy to monopolize any part of the same.

II.

INTERPRETATION OF THE STATUTE IN THE LIGHT OF THE COMMON LAW.

It is a well-established doctrine in Federal jurisprudence that there are no common law offences against the United States. *United States v. Hudson*, 7 Cr. 32; *United States v. Coolidge*, 1 Wheat. 415; *United States v. Britton*, 108 U. S. 199, 206; *Man-*

chester v. Mass., 139 U. S. 240, 262 *et* 3; United States v. Eaton, 144 U. S. 677, 687. In other words, the criminal jurisdiction of the courts of the United States is wholly statutory. Manchester v. Mass., 139 U. S. 240, 262, and cases cited *supra*. But, nevertheless, the common law may be resorted to for definition of common law terms employed by Congress in legislation. For example: "utters," United States v. Carll, 105 U. S. 611; "embezzles," United States v. Britton, 107 U. S. 655, 669; United States v. Northway, 120 U. S. 327, 334; and "murder," Ball v. United States, 140 U. S. 118. So, analogously, under the present Act, the courts have looked to the common law for the interpretation of the words and phrases: "monopoly," *In re* Corning, 51 F. R. 205, 211 *et* 212; *In re* Greene, 52 F. R. 104, 115; United States v. Trans. Mo. Freight Association, 53 F. R. 440, 452; "contract," *In re* Greene, 52 F. R. 111; "combination," *In re* Greene, 52 F. R. 111; "conspiracy," *In re* Greene, 52 F. R. 111; "in restraint of trade," *In re* Corning, 51 F. R. 211; *In re* Greene, 52 F. R. 111; United States v. Patterson, 55 F. R. 605, 640. This view, furthermore, coincides with the express intention of Congress when passing the Act, as is shown by the remarks of Senator Edmunds in the Senate upon report of it in its final form from the Judiciary Committee:—

"We all felt it; and the Committee—I think unanimously, including my friend from Mississippi [Senator George]—thought that if we were really in earnest in wishing to strike at these evils broadly, in the first instance, as a new line of legislation, we would frame a bill that should be clearly within our constitutional power, *that we should make its definition out of terms that were well known to the law already*" (21 Cong. Rec. 3148).

III.

MONOPOLY.

A "monopoly" is defined by Lord Coke as follows:—

"A monopoly is an institution, or allowance by the king by his grant, commission, or otherwise to any person or persons, bodies politic or corporate, of or for the sole buying, selling, making, working, or using of anything, whereby any person or persons, bodies politic or corporate, are sought to be restrained of any freedom or liberty that they had before, or hindered in their lawful trade" (3 Inst. 181).

And by Hawkins, as follows:—

"A monopoly is an allowance by the king to a particular person or persons of the sole buying, selling, making, working, or using of any-thing, whereby the subject in general is restrained from the freedom of manufacturing or trading which he had before" (Hawk. P. C., bk. i. c. 79).

And by Popham, C. J., in the Case of Monopolies :—

"And this word *monopolium dicitur* ἀπὸ τοῦ μόνου ἢ πωλέω, *quod est, cum unus solus aliquod genus mercaturæ universum emit, pretium ad suum libitum statuens*" (2 Co. 84, 86).

"Monopolies," in the above sense, became especially common in the reign of Queen Elizabeth, who granted great numbers of them to her favorite courtiers. Hume thus describes them in his History of England :—

"The active reign of Elizabeth had enabled many persons to distinguish themselves in civil and military employments; and the queen, who was not able from her revenue to give them any rewards proportioned to their services, had made use of an expedient which had been employed by her predecessors, but which had never been carried to such an extreme as under her administration. She granted her servants and courtiers patents for monopolies; and these patents they sold to others, who were thereby enabled to raise commodities to what price they pleased, and who put invincible restraints upon all commerce, industry, and emulation in the arts. It is astonishing to consider the number and importance of those commodities which were thus assigned over to patentees. Currants, salt, iron, powder, cards, calf-skins, fells, pouldavies, ox-shin-bones, train-oil, lists of cloth, potashes, anise-seeds, vinegar, seacoals, steel, aquavita, brushes, pots, bottles, saltpetre, lead, accidents, oil, calamine stone, oil of blubber, glasses, paper, starch, tin, sulphur, new drapery, dried pilchards, transportation of iron ordnance, of beer, of horn, of leather, importation of Spanish wool, of Irish yarn: these are but a part of the commodities which had been appropriated to monopolists. When this list was read in the House, a member cried, 'Is not bread in the number?' 'Bread!' said every one with astonishment. 'Yes, I assure you,' replied he, 'if affairs go on at this rate, we shall have bread reduced to a monopoly before next parliament.' These monopolists were so exorbitant in their demands that in some places they raised the price of salt from sixteen pence a bushel to fourteen or fifteen shillings. Such high profits naturally begat intruders upon their commerce; and in order to secure themselves against encroachments, the patentees were armed with high and arbitrary powers from the Council, by which they were enabled to oppress the people at pleasure, and to exact money from such as they thought proper to accuse of interfering with their patent. The patentees of saltpetre, having the

power of entering into every house, and of committing what havoc they pleased in stables, cellars, or wherever they suspected saltpetre might be gathered, commonly extorted money from those who desired to free themselves from this damage or trouble. And while all domestic intercourse was thus restrained, lest any scope should remain for industry, almost every species of foreign commerce was confined to exclusive companies, who bought and sold at any price that they themselves thought proper to offer or exact" (4 History of England, Harper's ed., 335-336).

The "monopolies" here described were nothing more than royal patents; and restriction of competition under them was effected, not by the act of the individual, but by the exclusive character of the grant.

The question of the legality of such licenses first arose, in 1602, in the case of *Darcy v. Allen*, 11 Co. 84; *Noy*, 173; *Moore*, 673; 8 Co. 125. The plaintiff in this case had received a patent which gave him the exclusive privilege for twenty-one years of manufacturing playing-cards. This right was infringed by the defendant, and the plaintiff brought a suit for damages. The defendant set up the illegality of the plaintiff's patent. The grant was declared void for the following reasons:—

"(1) All trades, as well mechanical as others, which prevent idleness (the bane of the Commonwealth), and exercise men and youth in labor, for the maintenance of themselves and their families, and for the increase of their substance, to serve the queen when occasion shall require, are profitable for the Commonwealth; and therefore the grant to the plaintiff to have the sole making of them is against the common law, and the benefit and liberty of the subject.

"(2) The sole trade of any mechanical artifice, or any other monopoly, is not only a damage and prejudice to those who exercise the same trade, but also to all other subjects; for the end of all these monopolies is for the private gain of the patentees.

"(3) The queen was deceived in her grant; for the queen, as by the preamble appears, intended it to be for the weal public, and it will be employed for the private gain of the patentee, and for the prejudice of the weal public.

"(4) This grant is *primæ impressionis*, for no such was ever seen to pass by letters patents under the great seal before these days, and therefore it is a dangerous innovation, as well without any precedent or example as without authority of law or reason."

"Monopolies" were also said to have the following inseparable incidents:—

"(a) That the price of the same commodity will be raised ; for he who has the sole selling of any commodity may and will make the price as he pleases.

"(b) That after the monopoly granted, the commodity is not so good and merchantable as it was before ; for the patentee, having the sole trade, regards only his private benefit, and not the Commonwealth.

"(c) It tends to the impoverishment of divers artificers and others, who before, by the labor of their hands in their art or trade, had maintained themselves and their families, who now will of necessity be constrained to live in idleness and beggary."

Notwithstanding that these patents were declared void at common law, in order to do away with the abuse beyond question Parliament in 1623 passed the statute against "monopolies," which, among other things, provided as follows : —

"That all monopolies, and all commissions, grants, licenses, charters, and letters patents heretofore made or granted, or hereafter to be made or granted, to any person or persons, bodies politic or corporate whatsoever, of or for the sole buying, selling, making, working, or using of anything within this realm, or the dominion of Wales, or of any other monopolies, or of power, liberty, or faculty to dispense with any others, . . . are altogether contrary to the laws of this realm, and so are and shall be utterly void and of none effect, and in no wise to be put in use or execution."

No criminal penalty was enacted by this statute ; but a civil remedy, at common law, with treble damages, was provided, in case of any one "hindered, grieved, disturbed, or disquieted, or his . . . goods or chattels any way seized, attached, distrained, taken, carried away, or detained, by occasion or pretext of any monopoly."

Also, *at common law*, there was no such *offence* as "monopolizing." The case cited by Coke in his *Institutes*, to the effect that there was, is a case of "procuring a license" for the "sole sale of sweet wines in London," and not of "monopolizing" under a patent, or, for that matter, without one (3 *Inst.* 181). Furthermore, there is supposed to be very slight authority for Coke's citation. See *Hawk. P. C.*, bk. i. c. 79 (ed. 1795, at p. 294).

It is thus plain (1) that Congress could not have had in mind a "monopoly" in the *common law* sense of the term ; (2) that "monopoly" *at common law* implied an *exclusive* control of one branch of industry, without *legal right* of any other person to interfere therewith by competition or otherwise.

IV.

ENGROSSING.

This word is not used in the statute, but it is a term so commonly assimilated with "monopolizing" as to be often mistaken for it. So authoritative a writer as Hawkins says, —

"'Monopoly' differs from '*engrossing*' only in this, that '*monopoly*' is by patent from the king, and '*engrossing*' by the act of the subject between party and party."

So, likewise, Blackstone, —

"'Monopolies' are much the same offence in other branches of trade that '*engrossing*' is in provisions, being a license or privilege allowed by the king for the sole buying and selling, making, working, or using of anything whatsoever."

Also, Pollexfen, in his argument in *East India Company v. Sandys*, Skin. 165, 169: —

"By common law, he said that trade is free, and for that cited 3 Inst. 81; F. B. 65; 1 Roll. 4; that the common law is as much against '*monopoly*' as '*engrossing*;' and *that they differ only, that a 'monopoly' is by patent from the king, the other is by the act of the subject between party and party*; but that the mischiefs are the same from both, and there is the same law against both. Moore, 673; 11 Rep. 84. The sole trade of anything is '*engrossing*' *ex rei natura*, for whosoever hath the sole trade of buying and selling hath '*engrossed*' that trade; and whosoever hath the sole trade to any country, hath the sole trade of buying and selling of the produce of that country, at his own price, which is an '*engrossing*.'"

It becomes necessary, therefore, to consider the nature of "*engrossing*," with a view to the light that it may throw upon the meaning of "*monopolizing*."

1. "*Engrossing*" was confined to "*trading*."¹ It not only was effected without "*patent of the king*," but also did not include "*artisanship*" or "*manufacturing*." The statute of 5 & 6 Edw. VI., which created the offence, provided, "*Whatsoever person*

¹ "*Engrossing*" was defined by the statute of 5 & 6 Edw. VI. c. 14, as follows: "*Whatsoever person or persons . . . shall engross or get into his or their hands by buying, contracting, or promise-taking, other than by demise, grant, or lease of land, or tithe, any corn growing in the fields, or any other corn or grain, butter, cheese, fish, or other dead victual whatsoever, within the realm of England, to the intent to sell the same again, shall be accepted, reputed, and taken an unlawful engrosser or engrossers.*"

or persons engross or get into his or their hands *by buying, contracting, or promise-taking.*"

2. "*Engrossing*" was limited to the necessities of life in the nature of provisions and the like. Cro. Jac. 214 (1609); 13 Co. 18 (1609); Pettamberdass v. Thackoorseydass, 7 Moore's P. C. Cas. 239, 262 (1850). The statute of 5 and 6 Edw. VI., cited *supra*, expressly specified the articles therein included: "Any corn growing in the fields, or any other corn or grain, butter, cheese, fish, or other dead victual whatsoever." The statute seems to have been held as embracing: (a) "corn," 2 Leon. 38 (1588); Lane, 59 (1610); 2 Buls. 317 (1615); 1 Roll. 134 (1615); 2 Roll. 33 (1619); 6 Mod. 32 (1704); (b) "fish," 2 Buls. 248, *n.* (1614); 1 Roll. 12 (1615); Cro. Car. 314 (1634); Jones, 320 (1634); (c) "butter and cheese," Jones, 156 (1623); (d) "salt," Cro. Car. 231 (1632); Sty. 190 (1649); (e) "straw and hay," Cro. Car. 380 (1635); (f) "oats," Hard. 231 (1663); (g) "wild-fowl," 1 Ld. Raym. 475 (1700); but not (h) "apples," Cro. Jac. 214 (1609); 13 Co. 18 (1609),¹ Sty. 190 (1649); or (i) "pears" or "cherries," Sty. 190 (1649); or (j) "hops," Cro. Car. 231 (1632); Sty. 190 (1649); or (k) "barley" converted into "malt," Godb. 144 (1587); Owen, 135 (1612); or (l) "corn" converted into "meal," Moore, 595 (1593); Owen, 135 (1612); or (m) "meal" or "wheat" converted into "starch," 4 Leon. 240, 241 (1611); Owen, 135 (1612); Bridge, J., 5 (1621). In 1800, "engrossing" of hops (differing herein from the case above) was held to be an offence, *at common law*, on the ground that the uses to which hops had more recently been put had changed these into necessities. Rex v. Waddington, 1 East, 143, 155 *et* 6 (1800).

3. "*Engrossing*" must be accompanied with an intent to re-sell. The statute of 5 & 6 Edw. VI. c. 14, reads: "To the intent to sell the same again." Bristow *et al.*, Exors., v. Waddington, 2 Bos. & Pul. N. R. 355 (1806). And the identity of the article purchased must remain unchanged. Cases of conversion, cited *supra*.

4. The quantity "engrossed" need not be the whole, or approxi-

¹ See distinction drawn in the opinion: "Also, always after the said Act [5 & 6 Edw. VI. c. 14], they have bought apples and other fruits by ingross, and sold them again, and before this time no information was exhibited for them, no more than for plums or other fruit, which serveth more for delicacy than for necessary food."

match the whole, of the given thing. It is sufficient if it be some considerable portion thereof. For instance: it apparently was "engrossing" to purchase "1000 quarters [that is, 8000 bushels] of corn," Lane, 59 (1610); "400 quarters [that is, 3200 bushels] of wheat," Bridge, J., 5 (1621); "672 pounds of butter, and 18,432 pounds of cheese," Jones, 156 (1623); "100 bushels of salt," Cro. Car. 231 (1632); "a great quantity of straw and hay," Cro. Car. 380 (1635); "1600 bushels of oats," Hard. 231 (1663); "great numbers of wild-fowl," 1 Ld. Raym. 475 (1700); "a great quantity of corn," 6 Mod. 32 (1704).

It is impossible, therefore, in view of the foregoing, to consider "engrossing" as having any relation to "monopolizing," and there was, in fact, no such purpose in the statute of 5 & 6 Edw. VI. c. 14. Its aim was simply to do away with middle-men and whole-sale traders, and so to bring consumers into direct communication with producers. In this particular, the offence was like the crimes of "forestalling" and "regrating," which were also made penal by the same statute.¹ Adam Smith, in his *Wealth of Nations*, published in 1776, describes the purpose of the statute correctly:—

"Our ancestors seem to have imagined that the people would buy their corn cheaper of the farmer than of the corn merchant, who, they were afraid, would require, over and above the price which he had paid to the

¹ A "forestaller" was defined by 5 & 6 Edw. VI. c. 14, as follows: "Whatsoever person or persons . . . shall (1) buy or cause to be bought any merchandise, victual, or anything whatsoever, coming by land or by water toward any market or fair to be sold in the same, or coming toward any city, port, haven, creek, or road of this realm, or Wales, from any parts beyond the sea to be sold; or (2) make any bargain, contract, or promise for the having or buying of the same, or any part thereof, so coming as aforesaid, before the said merchandise, victual, or other thing, shall be in the market, fair, city, port, haven, creek, or road, ready to be sold; or (3) shall make any motion by word, letter [message], or otherwise, to any person or persons for the enhancing of the price or dearer selling of any thing or things above mentioned; or (4) else dissuade, move, or stir any person or persons, coming to the market or fair, to abstain or forbear to bring or convey any of the things above rehearsed to any market, fair, city, port, haven, creek, or road, to be sold as is aforesaid, shall be deemed, taken, and adjudged a *forestaller*."

And a "regrator" was defined by said statute as follows: "Whatsoever person or persons . . . shall by any means regrate, obtain, or get into his or their hands or possession, in any fair or market, any corn, wine, fish, butter, cheese, candles, tallow, sheep, lambs, calves, swine, pigs, geese, capons, hens, chickens, pigeons, conies, or other dead victual whatsoever, that shall be brought to any fair or market within this realm or Wales, to be sold and do sell the same again in any fair or market holden or kept in the same place, or in any other fair or market within four miles thereof, shall be accepted, reputed, and taken for a *regrator* or *regrators*."

farmer, an exorbitant profit to himself. They endeavored, therefore, to annihilate his trade altogether. They even endeavored to hinder as much as possible any middle-man of any kind from coming in between the grower and the consumer" (Wealth of Nations, bk. iv. c. 5, ed. 1880, at p. 105).

"The statute of Edward VI., therefore, by prohibiting as much as possible any middle-man from coming in between the grower and the consumer, endeavored to annihilate a trade of which the free exercise is not only the best palliative of the inconveniences of a dearth, but the best preventative of the calamity; after the trade of the farmer, no trade contributing so much to the growing of corn as that of the corn merchant" (Wealth of Nations, bk. iv. c. 5, ed. 1880, at p. 109).

And in another passage he thus characterizes the legislation :

"The popular fear of engrossing or forestalling may be compared to the popular terrors and suspicions of witchcraft. The unfortunate wretches accused of this latter crime were not more innocent of the misfortunes imputed to them than those who have been accused of the former. The law which put an end to all prosecutions against witchcraft, which put it out of any man's power to gratify his own malice by accusing his neighbor of that imaginary crime, seems effectually to have put an end to those fears and suspicions, by taking away the great cause which encouraged and supported them. The law which should restore entire freedom to the inland trade of corn would probably prove as effectual to put an end to the popular fears of engrossing and forestalling" (Wealth of Nations, bk. iv. c. 5, ed. 1880, at p. 111).

Much attention was paid to the subject of "engrossing" in the case of *Rex v. Waddington*, 1 East, 143 (1800), cited *supra*. This was a prosecution *at common law* after the repeal of the statute of 5 & 6 Edward VI. c. 14, by that of 12 George III. c. 71. Parliament had evidently intended by this latter statute to do away with the common-law offence, if any, of "engrossing," as well as the statute offence itself; but, whatever might have been the purpose of Parliament, the court held that it had not done so. It further held that "engrossing" was a *common law* offence; but about this latter point there is unquestionably some doubt. See Chit., Cr. Law, 527, *n.* (a). Many counts occur in the Waddington indictment, but all were substantially based upon the fact that, for the purpose of raising the price of hops, the defendant had contracted for one-fifth of the amount thereof grown in one season in the counties of Worcestershire and Herefordshire. The point was raised that the quantity "engrossed" was less than the whole in

the kingdom. Lord Kenyon, however, refused to sustain the objection.

"Again, it is urged that the quantity purchased cannot constitute the offence of 'engrossing,' unless it bear such a proportion to the consumption of the whole kingdom as will affect the general price. The objection is new to me ; but if the opinions of Lord Mansfield, Mr. Justice Dennison, and Mr. Justice Foster are deserving of attention, there is as little in that objection as in the rest. I well remember an information moved for before them against certain persons for conspiring to 'monopolize' or raise the price of all the salt at Droitwich. They had no doubt of its constituting an offence, although it was not pretended that these persons had endeavored to 'engross' all or any considerable part of the salt in the kingdom. Nor was it questioned but that the 'monopolizing' of salt was an offence at common law."

Whether Lord Kenyon's prejudice against "forestallers," "regrators," and "engrossers"¹ be altogether creditable to him or not, it is unnecessary to say ; but he was undoubtedly right in holding that there could be an "engrossing" without a "monopolizing."

The result, then, is, —

(1) That "engrossing" was by contract ; (2) that it was confined to the necessities of life ; (3) that it was a mere purchase with an intent to re-sell, and did not include anything beyond a simple contract bargain ; (4) that it could take place without reference to the amount of the purchase, provided that the same was sufficient to constitute "wholesale trading ;" (5) that if "monopoly" ever became the offence of "engrossing," it became so, not because it was a "monopoly," but because it was also (incidentally or otherwise) "wholesale trading."

¹ In *Rex v. Rusby*, Peake's Add. Nisi Prius Cas. 189 (1800), a case *at common law* for "regrating thirty quarters [that is, two hundred and forty bushels] of oats," Lord Kenyon observed, in reference to the citation from Adam Smith hereinbefore given: "Speculation has said that the fear of such an offence is ridiculous ; and a very learned man, a good writer, has said you might as well fear witchcraft. I wish Dr. Adam Smith had lived to hear the evidence of to-day, and then he would have seen whether such an offence exists, and whether it is to be dreaded. If he had not been told that cattle and corn were brought to market, and then bought by a man whose purse happened to be longer than his neighbors', so that the poor man who walks the street and earns his daily bread by his daily labor could get none but through his hands, and at the price he chose to demand ; that it had been raised 3*d.*, 6*d.*, 9*d.*, 1*s.*, 2*s.*, and more a quarter on the same day, — would he have said there was no danger from such an offence?"

V.

MODERN CASES OF "MONOPOLY."

Within the past few years, since "trusts" have come into existence, the subject of "monopoly" has been given especial consideration. No criminal prosecution, however, has been brought, founded upon the common law. The question has arisen merely, either as to an *ultra vires* act of a corporation which made its charter or the act itself void, or else as to an illegal agreement in restraint of trade which was held unenforceable. Instances of the former class of cases are: *Clancy v. Salt Manufacturing Co.*, 62 Barb. 395; *Chicago Gas Light & Coke Co. v. The People's Gas Light & Coke Co.*, 121 Ill. 530; *Gibbs v. Consolidated Gas Co.*, 130 U. S. 396; *People v. North River Sugar Refining Co.*, 54 Hun, 354; *People v. Chicago Gas Trust Co.*, 130 Ill. 268; *People v. North River Sugar Refining Co.*, 121 N. Y. 582; *State v. Nebraska Distilling Co.*, 29 Neb. 700; *In re Richmond Retail Coal Co.*, 9 Ry. & Cor. L. J. 31; *People v. American Sugar Refining Co.*, 7 Ibid. 83; *State v. Standard Oil Co.*, 30 N. E. R. 279; *Attorney-General v. Central R. R. Co. of New Jersey*, 24 At. Rep. 964; *People v. Milk Exchange*, 30 N. E. R. 850. And of the latter: *Stanton v. Allen*, 5 Den. 434; *Clancy v. Salt Manufacturing Co.*, 62 Barb. 395; *Crawford v. Wick*, 18 Oh. St. 190; *The Morris Run Coal Co. v. The Barclay Coal Co.*, 68 Pa. 173; *Craft v. McConoughy*, 79 Ill. 346; *Arnot, Jr., v. The Pittston & Elmira Coal Co.*, 68 N. Y. 558; *Salt Co. v. Guthrie*, 35 Oh. St. 666; *Pullman Palace Car Co. v. Texas & Pacific Ry. Co.*, 11 F. R. 625; *Western Union Tel. Co. v. Burlington & So. Western Ry. Co.*, 11 F. R. 1; *McBirney v. The Consolidated White Lead Co.*, 9 Wk. L. Bul. 310; *Hoffman v. Brooks*, 11 Wk. L. Bul. 258; *Keene v. Kent*, 4 N. Y. St. R. 431; *Mill & Lumber Co. v. Hayes*, 76 Cal. 387; *Mallory v. Hanaur Oil Works*, 86 Tenn. 598; *Richardson v. Buhl*, 77 Mich. 632; *Texas & Pacific Ry. Co. v. Southern Pacific Ry. Co.*, 41 La. An. 971; *Samuels v. Oliver*, 130 Ill. 73; *Pittsburgh Carbon Co. v. McMillin*, 119 N. Y. 46; *Emery v. The Ohio Candle Co.*, 47 Ohio St. 320; *American Preservers' Trust v. Taylor Manufacturing Co.*, 46 F. R. 152; *American Biscuit & Manufacturing Co. v. Klotz*, 44 F. R. 721; *Strait v. National Harrow Co.*, 18 N. Y. Sup. 224; *DeWitt Wire Cloth Co. v. New Jersey*

Wire Cloth Co., 9 Ry. & Cor. L. J. 314; Texas Standard Cotton Oil Co. v. Adone, 19 S. W. R. 274; Whalen v. Brennan, 51 N. W. R. 759.

Some of the results of the leading decisions may be stated briefly as follows :—

1. *The fact that the "monopoly" has cheapened prices will not be considered.*

(a) "Much has been said in favor of the objects of the Standard Oil Trust, and what it has accomplished. *It may be true that it improved the quality and cheapened the cost of petroleum and its products to the consumer. But such is not one of the usual or general results of a 'monopoly'; and it is the policy of the law to regard, not what may, but what usually happens.*" — State v. Standard Oil Co., 30 N. E. R. 279, 290.

(b) "*It is possible that such a 'monopoly' may be used, as the defendants suggest, to introduce economies and cheapen coal; but it does violence to our knowledge of human nature to expect such a result.*" — Attorney-General v. Central R. R. Co. of New Jersey, 24 Atl. R. 964.

2. *The people as a body ought not to be "employés" and "servants."*

"*A society in which a few men are the employers, and the great body are merely employés or servants, is not the most desirable in a republic; and it should be as much the policy of the laws to multiply the numbers engaged in independent pursuits or in the profits of production as to cheapen the price to the consumer. Such policy would tend to an equality of fortunes among its citizens, thought to be so desirable in a republic, and lessen the amount of pauperism and crime.*" — State v. Standard Oil Co., 30 N. E. R. 279, 290.

3. *It makes no difference whether the "monopoly" be created by "contract" or "patent."*

"It is true in the case just cited the 'monopoly' had been created by letters patent. *But the objections lie not to the manner in which the 'monopoly' is created.* The effect on industrial liberty and the price of commodities will be the same, whether created by patent or by an extensive combination among those engaged in similar industries, controlled by one management." — State v. Standard Oil Co., 30 N. E. R. 279, 290.

"*The 'monopoly' with which the law deals is not limited to the strict equivalent of royal grants or people's patents. Any combination, the tendency of which is to prevent competition in its broad and general sense and to control, and thus at will enhance prices to the detriment of the public, is a legal 'monopoly.'*" — BARRETT, J., People v. North River Sugar Refining Co., 54 Hun, 354, 376.

4. A "monopoly" can exist even if the article be "susceptible" of "indefinite production."

"And this rule [*i. e.*, that the 'monopoly' is a 'monopoly'] is applicable to every 'monopoly,' *whether the supply be restricted by nature, or susceptible of indefinite production.* The difficulty of effecting the unlawful purpose may be greater in one case than in the other, but it is never impossible." — BARRETT, J., *People v. North River Sugar Refining Co.*, 54 Hun, 354, 376.

5. The "monopoly" need not be "permanent" or "complete."

"Nor need it [*i. e.*, the 'monopoly'] be permanent or complete. It is enough that it may be even temporarily and particularly successful. The question in the end is, Does it inevitably tend to public injury?" — BARRETT, J., *People v. North River Sugar Refining Co.*, 54 Hun, 354, 376.

6. There is a "monopoly" if there is a "limitation" of "competition," and "production," with a view to "advance prices."

"And where that appears to be the fact [*i. e.*, limiting of the supply, when that can be properly done, and advancing the prices of the products produced], the agreement, association, combination, or whatever else it may be called, having for its objects the *removal of competition* and the *advancement of prices of necessities of life*, is subject to the condemnation of the law, by which it is denounced as a criminal enterprise." — DANIELS, J., *People v. North River Sugar Refining Co.*, 54 Hun, 356, 379.

The foregoing fairly represents the American doctrine wherever it has been necessary for the courts to express an opinion upon the matter.

The English courts, however, seem to have taken a less rigorous view; they have held, —

1. That there may be "combinations of capital" in "indefinite amounts."

(a) "Thus, the stream of modern legislation runs strongly in favor of allowing great combinations of persons interested in trade, and intended to govern or regulate the proceedings of large bodies of men, and thus, necessarily, to interfere with what would have been the course of trade, if unaffected by such combinations. I therefore conclude that the combination in the present case cannot be held illegal, as opposed to the policy of the law." — FRY, J., *Mogul Steamship Co. v. McGregor, Gow & Co.*, L. R. 23 Q. B. D. 598, 627.

(b) "The truth is, that the combination of capital for purposes of trade and competition is a very different thing from such a combination of several persons against one, with a view to harm him, as falls under the

head of an indictable conspiracy. There is no just cause or excuse in the latter class of cases; there is a just cause or excuse in the former. There are cases in which the very fact of a combination is evidence of a design to do that which is hurtful without just cause, — is evidence — to use a technical expression — of malice. *But it is perfectly legitimate, as it seems to me, to combine capital for all the mere purposes of trade for which capital may, apart from combination, be legitimately used in trade. To limit combinations of capital, when used for purposes of competition, in the manner proposed by the argument of the plaintiffs, would in the present day be impossible, — would be only another method of attempting to set boundaries to the tides.*"—FRY, J., *Mogul Steamship Co. v. McGregor, Gow & Co.*, L. R. 23 Q. B. D. 598, 614, 617.

2. There may be "increase of business" to the "injury of another."

(a) "It remains to inquire whether the authorities assist in the decision of the question before us. As regards an individual, I have already pointed out that for one man to interfere with the lawful trade or business of another by molestation or any physical interference, or by fraud or misrepresentation, may be an actionable wrong. *But no authority appears to show that for one man to injure the business of another by mere competition, even though it may be successfully directed to driving the rival out of the town where he dwells or out of the business which he carries on, is actionable. And the silence of the books is strong evidence that such acts are not actionable.*"—FRY, J., *Mogul Steamship Co. v. McGregor, Gow & Co.*, L. R. 23 Q. B. D. 598, 627.

(b) "But the defendants have been guilty of none of these acts. They have done nothing more against the plaintiffs than pursue to the bitter end a war of competition waged in the interest of their own trade. To the argument that a competition so pursued ceases to have a just cause or excuse when there is ill-will or a personal intention to harm, it is sufficient to reply (as I have already pointed out) that there was here no personal intention to do any other or greater harm to the plaintiffs than such as was necessarily involved in the desire to attract to the defendants' ships the *entire tea freights* of the ports, a portion of which would otherwise have fallen to the plaintiffs' share. I can find no authority for the doctrine that such a commercial motive deprives of 'just cause or excuse' acts done in the course of trade which would but for such a motive be justifiable. So to hold would be to convert into an illegal motive the instinct of self-advancement and self-protection, which is the very incentive to all trade. *To say that a man is to trade freely, but that he is to stop short at any act which is calculated to harm other tradesmen, and which is designed to attract business to his own shop, would be a strange and impossible counsel of perfection.*" — FRY, J., *Mogul Steamship Co. v. McGregor, Gow & Co.*, L. R. 23 Q. B. D. 598, 614, 617.

(c) "*If peaceable and honest combinations of capital for purposes of trade competition are to be struck at, it must, I think, be by legislation, for I do not see that they are under the ban of the common law.*" — FRY, J., *Mogul Steamship Co. v. McGregor, Gow & Co.*, L. R. 23 Q. B. D. 598, 614, 617.

(d) "I agree with Lord Coleridge, C. J., and differ, with regret, from the Master of the Rolls. *The substance of my view is this, that competition, however severe and egotistical, if unattended by circumstances of dishonesty, intimidation, molestation, or such illegalities as I have above referred to, gives rise to no cause of action at common law.*" — FRY, J., *Mogul Steamship Co. v. McGregor, Gow & Co.*, L. R. 23 Q. B. D. 598, 614, 617.

VI.

"MONOPOLY" UNDER THE NATIONAL "ANTI-TRUST ACT."

There have been the following attempts at definition of this word in decisions under the Anti-Trust Act: —

1. "The second section is limited by its terms to '*monopolies*,' and evidently has as its basis the *engrossing* or *controlling* of the market." — PUTNAM, Circuit Judge, Circuit Court, Mass., *United States v. Patterson*, 55 F. R. 605, 640.

2. "A '*monopoly*,' in the prohibited sense, involves the element of an *exclusive* privilege or grant which restrained others from the exercise of a right or liberty which they had before the '*monopoly*' was secured. *In commercial law, it is the abuse of free commerce, by which one or more individuals have procured the advantage of selling alone or exclusively all of a particular kind of merchandise or commodity to the detriment of the public.* As defined by Blackstone (4 Bl. Comm. 159), and by Lord Coke (3 Co. Inst. 181), it is a grant from a sovereign power of the State by commission, letters patent, or otherwise, to any person or corporation, by which the *exclusive* right of buying, selling, making, working, or using anything is given. When this section of the Act was under consideration in the Senate, distinguished members of its judiciary committee and lawyers of great ability explained what they understood the term '*monopoly*' to mean; one of them saying, '*It is the sole engrossing to a man's self by means which prevent other men from engaging in fair competition with him.*' Another senator defined the term in the language of Webster's Dictionary: '*To engross or obtain, by any means, the exclusive right of, especially the right of trading to any place or with any country or district; as to "monopolize" the India or Levant trade.*' *It will be noticed that, in all the foregoing definitions of 'monopoly,' there is embraced two leading elements; viz., an exclusive right or privilege, on the one side, or a restriction or restraint on the other, which will operate to prevent the exercise of a right or liberty open to the public before the 'monopoly' was secured.* This

being, as we think, the general meaning of the term, as employed in the second section of the statute, an 'attempt to monopolize' any part of the trade or commerce among the States must be an attempt to secure or acquire an *exclusive* right in such trade or commerce by means which prevent or restrain others from engaging therein. It was certainly not a 'monopoly,' in the legal sense of the term, for the accused or the Distilling & Cattle Feeding Company to *own* seventy distilleries, and the products thereof, whether such products amounted to the whole or a large part of what was produced in the country. Their *ownership* and control of such products, as subjects of trade and commerce, is not what the statute condemns, but the 'monopoly,' or attempt to 'monopolize' the interstate trade or commerce therein. In this acquisition and operation of the seventy distilleries, which enabled the accused or said Distilling & Cattle Feeding Company to manufacture and control the sale of seventy-five per cent of the distillery products of the country, it does not appear, nor is it alleged, that the persons from whom said distilleries were acquired were placed under any restraint, by contract or otherwise, which prevented them from continuing or re-engaging in such business. *All other persons who chose to engage therein were at liberty to do so.* The effort to control the production and manufacture of distilling products, *by the enlargement and extension of business*, was not an attempt to 'monopolize' trade and commerce in such products within the meaning of the statute, and may therefore be left out of further consideration." — JACKSON, Circuit Judge, Circuit Court, S. D. Ohio, W. D., *In re Greene*, 52 F. R. 104, 115.

3. "A 'monopoly' is defined by Mr. Justice Story to be an '*exclusive* right, granted to a few, of something which was before of common right;' and by Lord Coke to be 'an institution by the king, by his grant, commission, or otherwise, to any persons or corporations, of or for the *sole* buying, selling, making, working, or using of everything whereby any persons or corporations are sought to be restrained of any freedom or liberty they had before, or hindered in their lawful trade.'" — RINER, District Judge, Circuit Court, Kans., *United States v. Trans.-Mo. Freight Association*, 53 F. R. 440, 452.

The following have been held not "monopolies" :—

1. Indefinite increase of business.

(a) "Congress may place restriction and limitations upon the right of corporations created and organized under its authority to acquire, use, and dispose of property. It may also impose such restrictions and limitations upon the citizen in respect to the exercise of a public privilege or franchise conferred by the United States. *But Congress certainly has not the power or authority under the commerce clause, or any other provision of the Constitution, to limit and restrict the right of corporations created by the States, or the citizens of the States, in the acquisition, control, and disposition of property. Neither can Congress regulate or prescribe the price or prices at which*

such property, or the products thereof, shall be sold by the owner or owners, whether corporations or individuals. It is equally clear that Congress has no jurisdiction over, and cannot make criminal, the aims, purposes, and intentions of persons in the acquisition and control of property, which the States of their residence or creation sanction and permit." — JACKSON, Circuit Judge, Circuit Court, S. D. Ohio, W. D., *In re Greene*, 52 F. R. 104, 112.

(b) "It is not very clear what Congress meant by the second section of the Act of July 2, 1890, in declaring it a misdemeanor to 'monopolize,' or 'attempt to monopolize,' any part of the trade or commerce among the States or with foreign nations. It is very certain that Congress could not, and did not, by this enactment attempt to prescribe limits to the acquisition, either by the private citizen or State corporation, of property which might become the subject of interstate commerce, or declare that when the accumulation or control of property by legitimate means and lawful methods reached such magnitude or proportions as enabled the owner or owners to control the traffic therein, or any part thereof, among the States, a criminal offence was committed by such owner or owners. All persons, individually or in corporate organizations, carrying on business avocations and enterprises involving the purchase, sale, or exchange of articles, or the production and manufacture of commodities which form the subjects of commerce, will, in a popular sense, 'monopolize' both State and interstate traffic in such articles or commodities just in proportion as the owner's business is increased, enlarged, and developed. *But the magnitude of a party's business production, or manufacture, with the incidental and indirect powers thereby acquired, and with the purpose of regulating prices and controlling interstate traffic in the articles or commodities forming the subject of such business, production, or manufacture, is not the 'monopoly,' or attempt to 'monopolize,' which the statute condemns.*" — JACKSON, Circuit Judge, Circuit Court, S. D. Ohio, W. D., *In re Greene*, 52 F. R. 104, 115.

2. Fixing of arbitrary prices.

"The first question is, Does it constitute a violation of the statute for two or more dealers to fix an arbitrary price for their goods? *No authority has gone to the extent of holding that such a transaction, in the absence of other facts, is illegal.*" — COXE, District Judge, Circuit Court, S. D. N. Y., *Dueber Watch Case Manufacturing Co. v. Howard Watch & Clock Co.*, 55 F. R. 851, 853.

3. Agreement not to trade with any one who trades with others than the covenantors.

"The second question is: Is it an illegal act, within the provisions of the law in question, for two or more traders to agree among themselves that they will not deal with those who prefer to purchase the goods of another designated trader in the same business? Many perfectly legiti-

mate reasons might be suggested for such an agreement. It is not a combination to 'monopolize;' at least, there is no statement of facts tending to show that it produced a 'monopoly' in the present case. Indeed, it would seem that it must have had a contrary effect. *There was surely nothing to prevent the plaintiff from supplying its customers with those things which the defendants declined to sell them, and thus enlarge its trade and stimulate competition. The plaintiff was perfectly free to engage in every branch of the watchmaking business. So were all others.* The plaintiffs' customers were free to purchase of the plaintiff, of the defendants, or of any other manufacturer." — COXE, District Judge, Circuit Court, S. D. N. Y., Dueber Watch Case Manufacturing Co. v. Howard Watch & Clock Co., 55 F. R. 851, 853.

It is impossible now to say what the effect of the Act, as interpreted by the courts, will finally be. It must be plain, however, that there cannot be any operative construction of the statute, which confines "monopoly" under it to an "exclusive control," and that there are grave doubts whether, indeed, there can be any construction of it such as to render it constitutional. No attempt has been made here to discuss the first section, or to cite authorities thereupon; but if Judge Putnam be right in his expression of opinion in *United States v. Patterson*, cited *supra*, this section is to take color from the second, and is likely, therefore, to stand or fall with it. But one conclusion, upon the whole, can be reached. The Act is necessarily vague, because, in men's minds, the evil dreaded is vague, and like words, therefore, have been used to express it. The English judges seem to have been clearly conscious of the difficulties ahead when, in *Mogul Steamship Co. v. McGregor, Gow & Co.*, L. R. 23 Q. B. D. 598, 614, 617, Fry, J., said: "I myself should deem it to be a misfortune if we were to attempt to prescribe to the business world how honest and peaceable trade was to be carried on, in a case where no such illegal elements as I have mentioned exist, or were to adopt some standard of judicial 'reasonableness,' or of 'normal prices,' or 'fair freights,' to which commercial adventurers, otherwise innocent, were bound to conform."

William F. Dana.

THE INTERCHANGEABLE MILEAGE CASE.

I.

THE Supreme Judicial Court of Massachusetts has again divided upon a question of constitutional law. In *Attorney-General v. Old Colony Railroad*,¹ a majority has held that the law providing for the issue by each Massachusetts railroad of mileage tickets, to be received upon every railroad in the State, is unconstitutional.

The Act upon which proceedings in the case were founded (Stat. 1892, ch. 389) is as follows: —

"Sect. 1. Every railroad corporation operating within this Commonwealth shall provide and have on sale for twenty dollars mileage tickets representing one thousand miles, which shall be accepted and received for fare and passage upon all railroad lines in this Commonwealth, as well and under like conditions as upon the line or lines of the corporation issuing such ticket.

"Sect. 2. Such tickets or any part thereof shall be redeemed by each corporation issuing the same, upon presentation by any other railroad corporation.

"Sect. 3. On petition of any railroad corporation included within the provisions of this Act, filed with the railroad commissioners, asking that it may be exempt, or that any other railroad be excluded from the provisions of this Act, said commissioners may in their discretion exempt or exclude such railroad from the provisions of this Act, if in their judgment the public welfare or the financial condition of the road require or demand it."

The defendant corporation having refused to comply with the provisions of the Act, the Attorney-General filed an information to compel it so to do. The court held the Act unconstitutional, and dismissed the information. It is unfortunate that even that majority of the court which declared the statute unconstitutional was unable to agree upon the reason for its decision.

It would therefore seem that since a majority of the whole court agreed upon no principle of law, but only in the result, the case is

¹ 35 N. E. Rep. 252.

of no value as a precedent. But as the statute itself was of much importance, an examination of the question may not be unprofitable.

It is also unfortunate that the different grounds upon which the majority proceeded are not more clearly stated. In questions of constitutional law there is necessarily greatness of scope and some vagueness of outline. The utmost care is therefore required to reach the result by strictly legal reasoning, and above all to make certain what clause, if any, of the Constitution is relied upon as making the Act in question void. It is perhaps the highest quality of a legal mind, as distinguished from the merely philosophical or ethical, that it permits no uncertainty of meaning and no looseness of argument. An Emersonian sentence could not be tolerated in an opinion of Marshall.

Field, C. J. (with whom Allen and Morton, JJ., concurred), held the statute unconstitutional because "the statute authorizes one railroad to determine the conditions on which another railroad must carry passengers, and compels one railroad to carry passengers on the credit of another." What constitutional provisions Chief Justice Field had in mind is not clear. A somewhat careful examination has discovered but two,¹ each forbidding the taking of individual property without compensation. In the course of the opinion it is said: "If it be assumed that under the power to regulate the fares of common carriers of passengers the Legislature can require the passengers to be carried before the fares have been actually paid in money, the security for the ultimate payment of the fares in money ought, we think, to be as certain as that required when private property is taken for public uses." This may mean that in the opinion of Field, C. J., the statute has resulted in the taking of property; if so, the learned judge has not expressed himself with his usual clearness.

That the three judges who concur in this opinion did not mean to base their objection to the statute on the ground that it effected a taking of property, is made probable by the carefully guarded language of the following paragraph. "Mr. Justice Lathrop and Mr. Justice Barker agree that the informations are rightfully brought by the Attorney-General, and that the court has jurisdiction, and are of opinion that the necessary effect of the statute is to apply and appropriate individual property to the public use without the owner's consent, and without legal provision for a reasonable com-

¹ Mass. Const. Pt. I. Art. X.; Const. U. S. Amend. XIV.

pensation therefor; and for this reason they agree that the statute is void, without expressing an opinion upon the other matters discussed in this opinion."

We have, then, this result. Two judges, Knowlton and Holmes, JJ., held the statute not unconstitutional. Lathrop and Barker, JJ., held it repugnant to the constitutional provisions which govern the taking of private property. Three judges held it unconstitutional, on what ground does not clearly appear. But if no taking of property was effected by the statute, there seems to be no constitutional provision to make it void. Let us inquire, then, what property, if any, is taken by the statute.

II.

When a railroad company undertakes the business of a carrier, its property is of two sorts: first, its franchise; second, the real and personal property which it provides for transporting passengers and goods from place to place. To its franchise it has no absolute right. That is resumable by the State which gave it, and may be withdrawn at any time (subject to a condition discussed later) without compensation. Its real and personal property, road-bed, bridges and rails, locomotives and cars, stations and platforms, are protected by the Constitution, and a State can do no act to destroy their actual value without providing compensation for the taking. It seems to be the better opinion that the State cannot so regulate the affairs even of a corporation engaged in a public employment as to destroy the value of the property actually invested. The value of the property of a railroad would be in part destroyed if the earning capacity of the road were so reduced by the Legislature that it would not pay to operate, and must therefore be abandoned; for the value of its immovable property would then become almost nothing. Any regulation of the corporation's affairs which still enables the corporation to conduct its business at a profit is not objectionable on the ground that it is a taking of its land or its chattels, though it may greatly reduce its income. It was strongly asserted by Knowlton, J., that this Act would not appreciably reduce the earnings of any railroad. "The risk of pecuniary loss to a corporation from carrying a passenger on the credit of another corporation to which the money has been advanced for carriage, instead of having payment at the time, is almost infini-

tesimal." And there was, in fact, no allegation in the answer of the defendants that the Act would cripple the resources of the road. The power given by Section 3 to the railroad commissioners to exclude a road from the provisions of the Act would seem to prevent all possibility of such a result.

If the Act effects a taking of any sort, it is a taking of the use of property. If it had provided that every owner of a vehicle in the Commonwealth should be obliged to transport his neighbors on demand, receiving in payment therefor their promissory notes, we should evidently have a taking of the use of vehicles. How, if at all, does our Act differ?

The difference lies in this: that the use of the property of a public carrier is already devoted to the public. Thus, it is obliged to keep safe stations and platforms for all who have business at its trains; ¹ to stop at its regular stopping-places; ² to protect passengers who are about to take the train, even if they have not purchased a ticket; ³ and to allow hackmen, expressmen, etc., to enter their stations for the purpose of soliciting patronage from passengers. ⁴ The vehicles of the carrier are not, to be sure, absolutely devoted to the use of the public; the public has the right to use them only upon payment of fare. But if such passengers as take advantage of the Act can be said to pay their fares, the Act does not result even in taking the use of property. What, then, is a payment of fare?

Payment of fare is not the payment of a debt, properly so called. For instance, the passenger need not tender the exact amount. ⁵ The payment is of a double nature: first, the performance of an obligation of a quasi-contractual nature, like the obligation to pay the fee of a public officer; ⁶ second, the performance of a condition which secures the payer the right to ride. The exact

¹ *Tobin v. Railroad*, 59 Me. 183; *Hale v. Railway*, 60 Vt. 605.

² *Sears v. Eastern R. R.*, 14 All. 434; *Heirn v. McCaughan*, 32 Miss. 17; *Purcell v. Railroad*, 108 N. C. 414.

³ *Brien v. Bennett*, 8 C. & P. 724; *Smith v. Railway*, 32 Minn. 1; *Perry v. Railroad*, 66 Ga. 746; *Swigert v. Railroad*, 75 Mo. 475; *Hickinbottom v. Railroad*, 15 N. Y. St. Rep. 11.

⁴ *Hack Co. v. Sootsma*, 84 Mich. 194; *Railway v. Langlois*, 9 Mont. 419; *Cravens v. Rodgers*, 101 Mo. 247; *McConnell v. Pedigo*, 18 S. W. 15 (Ky.); *S. B. Co. v. Transportation Co.*, 10 So. 480 (Fla.). And see *Griswold v. Webb*, 16 R. I. 649. There is, to be sure, a single case *contra*, *Railroad v. Tripp*, 147 Mass. 35, decided by a bare majority of the court. The powerful dissenting opinion of Judge Field has been quoted with approval in most of the cases cited above.

⁵ *Barrett v. Railway*, 81 Cal. 296.

⁶ *Keener on Quasi-Contracts*, 18.

nature of this condition and obligation is determined by law, and may be changed by law; and so long as its nature remains the same, the change is not unconstitutional.

"A mere common law regulation of trade or business may be changed by statute. A person has no property, no vested interest, in any rule of the common law. That is only one of the forms of municipal law, and is no more sacred than any other. Rights of property which have been created by the common law cannot be taken away without due process; but the law itself, as a rule of conduct, may be changed at the will, or even at the whim, of the Legislature, unless prevented by constitutional limitations. Indeed, the great office of statutes is to remedy defects in the common law as they are developed, and to adapt it to the changes of time and circumstances."¹

Does this Act, then, effect a complete and oppressive change in the nature of fare? In order to determine this question, let us see what power the Legislature is admitted to possess over fares.

1. It is as well settled as any principle of law can be settled by multitude of precedents that the Legislature may fix the maximum amount of fare.² At common law a carrier might exact such amount as the court would not hold to be unreasonable; but by the Granger Acts and similar legislation, the maximum fare is fixed at the pleasure of the Legislature, without considering what the court would pronounce reasonable.

2. It has already been decided in Massachusetts³ that the Legislature may allow a certain class of passengers to ride for less than a reasonable fare. By the Act there upheld, a ferry company was required to carry all passengers who crossed the ferry in a street-car for one cent each. The statutory rate of fare for other passengers was three cents. No difference appears or was suggested in the cost of carrying the two sorts of passengers. If three cents was in the opinion of the Legislature no more than a reasonable fare, it will hardly be denied that one-third of that amount was unreasonably low. Two different amounts may perhaps both be reasonable; but the lower must be remunerative, and the other cannot yield more than a reasonable profit. If the difference in this case was all profit, it could hardly be claimed that two hundred per cent was

¹ Waite, C. J., in *Munn v. Illinois*, 94 U. S. 113, 134.

² *Munn v. Illinois*, 94 U. S. 113; *Railway v. Iowa*, 94 U. S. 155; *Budd v. New York*, 143 U. S. 517, and cases cited.

³ *Parker v. Railway*, 109 Mass. 506.

not unfairly large, and the amounts cannot therefore both be reasonable. But if one cent was reasonable, three cents was, upon the same considerations, more than reasonable; and the Legislature was treating foot-passengers (by exacting an unreasonable fare) in the same way that on the other hypothesis it was treating the ferry company. The decision, therefore, necessarily means that the Legislature has power to reduce the fares of some passengers to less than a reasonable rate; not of any special class of passengers, but of all who may ride in street-cars.

3. It seems clear that the Legislature may exempt some passengers altogether from payment of fare. No decision on this point has been found by the writer; but in establishing a tariff of fares a Legislature must have the power, for instance, to exempt young children.

All carriers are subject to legislative power to the extent indicated; but the carriers now in question stand in a peculiar position. Massachusetts railroads (at least those concerned in this suit, the Old Colony and Boston & Albany) were built under charters closely modelled on the charters of turnpike companies. The earliest chartered of the railroads which now make up the Old Colony and the Boston & Albany¹ were the Boston & Providence Railroad,² the Taunton Branch Railroad,³ and the Boston & Worcester Railroad.⁴ The first corporation was empowered only to build the road; the two latter to build and operate it. In all the charters the following clauses occurred, which show the conception then held of the right and obligations of the corporations:

"Be it further enacted that a toll be and hereby is granted and established, for the sole benefit of said corporation, upon all passengers and property of all descriptions which may be conveyed or transported upon said road. . . . The transportation of persons and property, the construction of wheels, the form of cars and carriages, the weight of loads,

¹ Except the Granite Railway (Stat. 1825, ch. 183; 6 Mass. Special Laws, 466). This road was built, before the days of steam railroads, to convey granite from the Quincy quarries to tidewater, and is said to have been the earliest railroad operated in the United States. It now forms part of the Old Colony system. It is noteworthy that none of the clauses quoted were contained in the charter of this road, evidently because it was not to form a public highway, but was a private carrier appurtenant to private quarries. It was to operate its own road, and to "collect a reasonable toll for the conveyance of stone and other property in [its] cars and vehicles."

² Stat. of 1831, ch. 56; 7 Mass. Special Laws, 134.

³ Stat. of 1835, ch. 131; 7 Mass. Special Laws, 557. The last clause above quoted is not contained in this Act.

⁴ Stat. of 1831, ch. 72; 7 Mass. Special Laws, 152.

and all other matters and things in relation to the use of said road, shall be in conformity to such rules, regulations, and provisions as the directors shall from time to time prescribe and direct, and said road may be used by any persons who shall comply with such rules and regulations. . . . The directors are hereby authorized to erect toll-houses, establish gates, appoint toll-gatherers, and demand toll. . . . The state may authorize any company to enter with another railroad at any point of said railroad, paying for the right to use the same, or any part thereof, such a rate of toll as the Legislature may from time to time prescribe."

A railroad established under such a charter must of course expect its fares to have some of the qualities of toll received by a turnpike company. All turnpike charters in Massachusetts at this time exempted certain persons from payment of toll;¹ and any one was by the common law at liberty to use the turnpike without compensation if he did not pass a toll-gate.² The fare expected as a condition of carriage by the defendant railroads in this suit must therefore be subject to such conditions.

If, then, by the law as it existed at the time the defendants entered into business the payment of fare was so far subject to legislative control that the fare might in some cases be reduced to an amount not sufficient to produce a fair return upon the property invested, this Act cannot be said to alter the nature of fare. If the Legislature may constitutionally reduce fare to one cent, while a reasonable rate is three cents, there is nothing strange or shocking in its change of fare from three cents to the ticket of another railroad, of the market value of three cents. Or if this seem repugnant to one's idea of legal tender, it is surely no more objectionable than the entire exemption from payment of fare of a class of persons.

For the reasons stated, the Act does not result in a taking of property; and for the same reasons it does not interfere with freedom of contract. In the first place, the carrier does not usually enter into any contract with the passenger; the obligation on each side being created by law, not by agreement.³ In the second place, upon entering into the business of a carrier one gives up to some extent freedom of contract. It is elementary

¹ Stat. of 1804, ch. 125.

² Turnpike Co. v. Redd, 2 B. Mon. 30; Buncome Turnpike Co. v. Mills, 10 Ired. 30.

³ Marshall v. Railway, 11 C. B. 655; Foulkes v. Railway, 4 C. P. D. 267, 5 C. P. Div. 157; Nolton v. Western R. R., 15 N. Y. 444.

learning, for instance, that a carrier may not make certain contracts, such as contracts limiting its liability for negligence. An extreme instance of this sacrifice of freedom of contract is presented in the case of *Toledo &c. Ry. v. Pennsylvania Co.*,¹ where it was stated that the employees of a common carrier, though merely servants at will, cannot leave the service so abruptly as to cripple the public business ; and this principle would seem to hold true even if the company should become bankrupt.

The legislation under examination is therefore justified as a regulation of the fare of a common carrier.

Even without reference to the nature of the defendants as public carriers, their position as corporations holding franchises from the State prevents them from objecting to any legislation which on the principles already stated does not create a forfeiture of the property invested.

"No one, I suppose, has ever contended that the State had not a right to prescribe the conditions upon which such privilege [*i. e.*, a privilege granted by it] should be enjoyed. The State in such cases exercises no greater right than an individual may exercise over the use of his own property when leased or loaned to others. The conditions upon which the privilege shall be enjoyed being stated or implied in the legislation authorizing its grant, no right is, of course, impaired by their enforcement. The recipient of the privilege, in effect, stipulates to comply with the conditions. It matters not how limited the privilege conferred, its acceptance implies an assent to the regulation of its use and the compensation for it."²

Instances of the power of a State over a corporation chartered by it are worth considering in this connection. A railroad already completed may be required to bear the expense of a new bridge³ or of a crossing by a new railroad ;⁴ and a telephone company whose line is established cannot complain that a street railroad is allowed to use electricity as a motive power, and thus destroy the efficiency of the telephone current.⁵ So a railroad company may be required to build stations, and to share the use of them with other railroads.⁶ And one railroad may be given permission to use

¹ 54 F. R. 746, 752.

² Field, J., in *Munn v. Illinois*, 94 U. S. 113, 149.

³ *People v. Railroad*, 70 N. Y. 569.

⁴ *Railway v. Railway*, 30 Ohio St. 604.

⁵ *Railway v. Telegraph Association*, 48 Ohio St. 399.

⁶ See the opinion of Knowlton, J.

the tracks of another road upon such terms as may be fixed by a commission. It has been held in the latter case that the commissioners may fix the compensation on the basis of the number of passengers carried by the second company over the road of the first,¹ though in that case, of course, payment is deferred until the services have been rendered.

The fact that the Act under discussion was passed after the charter was granted and the road built is admitted to be immaterial; for all charters are subject to amendment since 1831.² Such a provision as that contained in the Act in question might have been inserted in the charters of the railroads, and (at least in Massachusetts) there is no doubt that the corporation, if it chooses to retain its franchise, must submit to such a provision if added by amendment. An Act of this kind is always considered to be in the nature of an amendment of the charter. It may be that a charter cannot be so amended as to work a forfeiture; but that, as has been seen, this Act does not do.

It remains to consider the second objection to the Act, — that it requires one carrier to carry according to the conditions of a ticket issued by another carrier. Accepting this interpretation of the Act (which is not quite clear), there is nothing unconstitutional about it. A "condition" can mean nothing but a limitation upon the common-law liability of the carrier. As the railroad is bound, in the absence of agreement, to transport as at common law, and as its liability, were it not for this provision, would be fixed by the law, the effect of the "condition," if any, is to lessen the burden upon the railroad affected by it. Take the instance discussed by the court: a condition limiting the amount of baggage to be carried. At common law the carrier must carry without additional compensation the personal baggage of every passenger. If there is no "condition" of which the carrier may take advantage, he must do so for the passenger who presents a mileage book of another road; if that book gives him permission to carry no more than a specified amount of baggage, however great, it can operate, if at all, only to limit the obligation of the carrier.³

¹ *Railway v. Railway*, 12 All. 262.

² Stat. of 1830, ch. 31.

³ It is true, as suggested by my colleague Judge Smith, that a carrier may by mere regulation, without contract, limit the amount or value of baggage to be carried free with a passenger, and that this right is invaded by the provisions of the Act. I have already expressed a doubt whether the Act is properly interpreted as covering such a

It is not possible to say that the condition of the ticket might extend the liability ; the obligation of a contract cannot be extended by a condition contained in it. A condition must be for the benefit of the party bound by the obligation. If a particular mileage book gives its holder a right greater than a ticket would give him, it must be by some positive contract added to the ticket, which would bind no other road than the one issuing it. A ticket gives the right to ride as a passenger, and incidentally to have personal baggage transported ; if a ticket should extend permission to the holder to carry samples of merchandise free, the document would be of a double nature, — a ticket, and a contract for the carriage of freight. Another railroad would be bound by the statute to recognize it only in the former aspect. So if a ticket secured the right to a berth in a sleeping-car, it would be both a ticket and a berth check, and would be good on another railroad only as a ticket.

III.

When the question before the court is viewed as one of public expediency, there can be no doubt as to the true result. The public convenience requires some such system as that established by the Act under consideration. There is no appreciable danger of loss to any railroad by reason of the system. Even if one road, in contemplation of bankruptcy, should sell enormous numbers of mileage tickets, the purchasers of them, and not the other railroads, would be the losers ; for the railroad commission would doubtless exclude the bankrupt road from the provisions of the Act, leaving the holders of its tickets to their remedy at common law. The practical result of the Act would be, without much doubt, that the more important roads would sell almost all the mileage tickets.

If, however, such an Act as this is not to be supported, we have an alarming state of affairs. It is necessary that bulky articles should be carried to their destination without transshipment ; are the railroads to be allowed to levy enormous tolls as conditions of

case ; but even if it is, it is hardly void for that reason. Such regulations are, without question, subject to legislative control. The amount of baggage to be carried could be settled by statute. It is true, perhaps, that the right to regulate the amount cannot be delegated to a stranger ; but the Legislature in this Act provides no more than that the railroads shall carry, upon mileage tickets of any road, all personal baggage of passengers, except such as is excluded by the provisions of the ticket. At the worst, there is no question of binding one road by the *contract* of another.

through carriage, on the ground that the Legislature has no right to regulate such a matter? Are they to refuse to carry passengers in cars of modern construction, except upon payment of an exorbitant fare? Are they to decline to check baggage through to its destination; or to draw sleeping-cars belonging to another corporation? The railroad company has acquired a valuable franchise, and has built up along its line great communities whose prosperity is involved in its fair dealing. The Constitution is surely established for the protection of the people, its creators, equally with that of the corporation, its creature. If either public interest or corporate interest must yield, no one can doubt which it should be. If a constitutional amendment is required to bring about the desired result, it may be had.

The court would apparently uphold an Act which would require the railroads to deliver mileage tickets to a State agent who should keep the proceeds of sale of the tickets, and redeem the coupons in the hands of the actual carriers. Would the railroads prefer an Act of that nature?

Statutes in every respect analogous to the one in question have been in force in Massachusetts for many years, and have been before the courts for interpretation several times.¹ These statutes require that the different street railroads in the city of Boston shall accept in payment of fare tickets and transfer checks issued by any other road, and that the ticket or check shall be redeemed by the company issuing it. The constitutionality of these statutes was not, to be sure, considered in the cases referred to; it appears to have been taken for granted. But the legislation was elaborately considered. Great weight should have been given by the court to these statutes, which have been acted upon without question for many years.

J. H. Beale, Jr.

¹ Pub. Stats. Mass., ch. 113, §§ 46, 47; *Wakefield v. Railway*, 117 Mass. 544; *Cronin v. Railway*, 144 Mass. 249.

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JUDICIAL WIT AND WISDOM. — In a recent case in Georgia, *Gilbert v. State*, 16 S. E. Rep. 652, where the question was whether the evidence sufficiently established the intent to murder required by the statute to merit the penalty proposed, the brief of the defendant's council, Mr. Leonidas McLester, opened thus: "When the mother of Achilles plunged him in the Stygian waters, his body became invulnerable, except the heel, by which she held him; and afterwards, when he and Ployxena, the daughter of the king of Troy, who were lovers, met in the temple of Apollo to solemnize their marriage, Paris, the brother of Hector, lurking behind the image of Apollo, slew Achilles by shooting him in the heel with an arrow." The court, speaking through Bleckley, C. J., after quoting this eloquent introduction, adds: "The brief of the Attorney-General is less poetic, but equally irrelevant. It cites seven cases from the Georgia Reports, not one of which has any bearing on the question; for in each of the cited cases the attempt to kill was successful. When a homicide actually occurs from the voluntary use of a deadly weapon, an intention to kill is very much more certain than it is when the man assaulted is not killed, but only shot in the toe." In the hurry and bustle to which the press of modern business too often condemns our courts, it is gratifying to observe that in one State at least the pleasant wit and elegant scholarship which have so long distinguished its bar and bench live on untouched by time.

COMMENT BY COUNSEL. — A very neat point is raised in the case of *Graves v. United States* (37 Central Law Journal, No. 23, 14 Sup. Ct. Rep. 40). The facts of the case are as follows: The plaintiff in error was tried for a murder alleged to have been committed in Indian Territory, and convicted, mainly upon circumstantial evidence. The prosecution proved by witnesses that when the deceased was last seen alive he was in the company of the prisoner and an unknown woman. The

prisoner set up an *alibi* as a defence. During the trial it was admitted that the prisoner's wife was in the same town, and that nevertheless she had not once been present in court. She was seen outside of the courtroom by one of the witnesses of the prosecution, who testified that he believed her to be the woman who was supposed to have been with the defendant at the time of the murder. The district attorney, in his argument to the jury, was allowed, against the objections of the defendant, to comment unfavorably upon the absence of the defendant's wife from court, and to pronounce it a suspicious circumstance that she had not been present, in order that the witnesses for the government might have had an opportunity to identify her. The action of the court in permitting these comments to be made was the ground for the assignment of error.

The Supreme Court, in a majority opinion which was delivered by Mr. Justice Brown, reversed the judgment of the lower court, and remanded the case, with instructions to set aside the verdict and grant a new trial. The reasoning of the court seems to be that since the defendant's wife was incompetent to testify as a witness either for or against her husband, and since he was under no obligation to cause her appearance in court, it would be unjust to allow the jury to be told that her absence was a circumstance against him. The court approve of the rule that in criminal cases, if a party has it peculiarly within his power to produce witnesses whose testimony would clear up the case, the fact that he does not do it creates the presumption that the testimony, if produced, would be unfavorable. But they distinguish the case under consideration on the ground that the wife was incompetent as a witness. The defendant could not have called his wife to the stand in order to let her throw light on the case by her testimony, and he was under no obligation to produce her for the purpose of giving the witnesses for the government a chance to identify her. Therefore the defendant was entitled not to have any attempt made to prejudice the jury against him by comment upon his omission to do what he was in no way bound to do.

It would seem clear, then, that the reasoning of the court is based upon the fact that the wife was incompetent as a witness. The case which apparently is relied upon as authority for the conclusion at which the court arrives is *Wilson v. United States*, 149 U. S. 60. That is a case which arose under a statute providing that a person charged with the commission of crime might, at his own request, be a competent witness on the trial, but that his failure to make such request should not create any presumption against him. The district attorney in his argument to the jury had commented unfavorably upon the fact that the defendant did not offer himself as a witness; and the court held that such comment was not permissible. The ground of the decision would appear to be that the liberty of the defendant to testify was a privilege, and that if unfavorable comment upon his omission to take advantage of the liberty were permitted, the benefit of the privilege would really be destroyed. But in the principal case there is no question of privilege. The defendant was not at liberty to call his wife to the stand if he desired, since she was absolutely incompetent to appear as a witness in the cause. Under these circumstances it rather puzzles one to understand how any argument derived from cases of privilege is applicable.

An extremely interesting dissenting opinion was delivered by Mr. Justice Brewer, in which he arrives at the conclusion that the failure of the defendant, under the circumstances, to bring his wife into court was

a legitimate subject for comment in argument. He lays down the rule that in the absence of express prohibition every fact which comes to the jury during the progress of the trial in a legal manner, and which might influence their minds, is a subject of comment by counsel in their arguments. As to the argument that the defendant's wife was not a competent witness, and that by this circumstance the case is distinguishable from cases where a party omitted to produce some witness whose testimony might have been enlightening, Mr. Justice Brewer says that while it is true that the wife could not have been called upon to give testimony, yet, on the other hand, she herself was testimony, and material testimony. He suggests that her non-appearance in court was suspicious, just as it would be a suspicious circumstance if it were proved that at the time of the murder the defendant had been in possession of a knife of a particular make, marked in a certain way, and that on the very morning of the trial a knife of the same make had been seen in the possession of the defendant, but that nevertheless the defendant had not produced the knife. The omission to produce the knife would be a significant fact, and one upon which the prosecuting attorney would be at liberty to comment. In the same way, the fact that the defendant's wife remained away from court, although it had been proved that she was near at hand where it would have been the easiest thing in the world for her to come, was a fact which would naturally affect the judgment of men, and in respect to which the district attorney was at liberty to comment.

It may be admitted that the point is a close one, and that the argument on each side is pretty strong. Perhaps the acknowledged tendency of the law to make presumptions in favor of the innocence of the accused in a criminal trial ought to turn the scale. The case where a party has it peculiarly within his own power to produce a witness whose testimony might elucidate the matter in issue is really not analogous. In such a case it is always conceivable that the witness might have proved the defendant's innocence. Therefore, since it might have been so much for his interest to produce the witness, the omission to do so raises a very strong presumption that the testimony would have been unfavorable to him. But in this case the presence of the wife in court could not have helped the defendant, while, on the contrary, it might have injured him seriously. If the witnesses for the government had failed to identify the prisoner's wife, there would be still nothing to show that some other woman was not with him at the time of the murder. On the other hand, if the woman had been identified, the identification would have furnished very convincing proof of the prisoner's guilt. The prisoner had everything to lose and nothing to gain by causing his wife to appear in court. It would hardly seem fair, then, to permit the prosecuting attorney to try to influence the minds of the jury by comment upon the defendant's omission to do what he was under no obligation to do, and which, had he done it, might have worked him very great harm, without any chance of its benefiting him at all. Upon this ground the opinion of the majority of the court would appear to be right.

NATURE OF A LANDOWNER'S RIGHT TO NATURAL GAS. — *Hague v. Wheeler*, 27 Atl. Rep. 714, was a bill by the owners of two plots of land overlying gas-bearing strata to enjoin the defendants, owners of a third adjacent piece of land, from allowing a gas well upon their premises to go

to waste. It was conceded that the defendants made no use of the gas, and the circumstances were held to negative malice in the sense of evil motive, the well having been drilled under an abortive agreement for the sale of gas to one of the plaintiffs. It seems also to have been conceded that the loss of the gas did cause *damnum* to the plaintiffs. The case was of the first impression. Under these circumstances, Noyes, P. J., in the court below, after a hasty examination of authorities, came, upon the same reasoning as that employed by the New Hampshire courts on the subject of percolating water, to substantially the same result, — apparently without consulting the New Hampshire authorities. In *Basset v. Company*, 43 N. H. 569, and other cases since then, the New Hampshire courts have decided — one can use the language of Noyes, P. J., in *Hague v. Wheeler* — that “The rights of adjoining owners . . . are qualified and correlative.” “The well is a mere conduit by which the gas [water] is enabled to escape.” “The landowner’s right . . . must of necessity be limited . . . by the requirement of ordinary care for the protection of others interested in common with himself.” Or, in the language of the New Hampshire court in deciding a point of law neatly put before it by a referee (64 N. H. 294), the use must be reasonable; and “in determining the question of reasonableness, the effect of the use upon the interests of both parties, the benefits derived from it by one, the injury caused by it to the other, and all the circumstances affecting either of them, are to be considered.” The dissent of so eminent a judge as Lord Wensleydale (*Chasemore v. Richards*, 7 H. L. Cas. 349, 380) goes to show that the case of percolating water is an extremely close one; the New Hampshire rule is stated upon good authority to work well. Under these circumstances it would seem that there was something more than chance in the result in the court below. Natural gas is a mineral product of great value, apparently not, owing to its elusive nature, the subject of property before drawn from the well. Unless strong reasons of expediency can be shown for such lack of control resulting in such waste, it should not be allowed. The doctrine which would control its use lies ready to hand, and comes up naturally and independently in the mind of the trial justice; it has worked well when applied to a case where the reasons for lack of control are stronger; and such regrettable waste might well be stopped by its application.

But the court above reversed this decision, drawing what seems, speaking with all due deference to so good a court, so familiar with the questions which natural gas has presented, to be a doubtful analogy between this case and that of “the owner of timber” who ‘may pile it in heaps and burn it . . . notwithstanding the fact that his neighbor has a sawmill and all the facilities for preparing the sawed lumber for market and converting it into money.’ They describe the rule which would justify the injunction as requiring an owner to surrender to his neighbor so much of his own property as he could not turn to his own advantage if his neighbor was so situated that he could profit by it.” They call this, at the most, a “moral obligation . . . not enforceable by civil process.” Now, the analogy to timber might, if fully carried out, justify instead of dispose of the claim for injunction; for if the right to gas is of such an absolute nature, the defendants’ well must draw molecules of gas from the plaintiff’s strata, and so cause a “conversion.” But such reasoning is impracticable. The analogy to percolating water is unmistakable, and the case is even a closer one for decision. It is to be regretted that the court above could not see its way to prevent such waste of valuable

powers of nature. The modern tendency is to lean in favor of control where possible, and these "minerals *feræ naturæ*," as the Pennsylvania courts have called natural gas and petroleum, are well worth controlling. On the other hand, it is a difficult matter to say what use of percolating water, oil, or natural gas is and what not injurious to the rights of others; and the courts may well hold, as the Pennsylvania court has done, that they will not run the risk of too much control for the sake of a doubtful benefit.

JUDICIAL NOTICE—WAIVER OF SOVEREIGNTY.—In *Mighell v. The Sultan of Johore*, a very recent English breach of promise case, the defendant has procured the judgment of the Court of Appeal confirming the dismissal of the action. Mr. Justice Wright, before whom the case originally came in chambers, inquired of the Marquis of Ripon, Secretary of State for the Colonies, concerning the defendant's status, and received the answer that Johore was an independent State, and the defendant (Mr. Albert Baker) its reigning sovereign. So far the case follows *Taylor v. Barclay*, 2 Sim. 213. The next step is interesting. The plaintiff endeavored to go into the evidence upon the subject, and cited a case in which the courts of Malacca had held that the defendant's predecessor was liable to be sued. In *The Charkieh*, L. R. 4 Ad. & Eccl. 59, Sir Robert Phillimore had based his decision, that the Khedive of Egypt was not a sovereign, upon general history, firmans, treaties, and an answer of the Foreign Office, devoting the larger part of his judgment to the first three grounds, but fortunately reaching the same conclusion as the Foreign Office. Hence, the plaintiff's counsel argued, the court ought to investigate the question, and decide the status of Johore for themselves. But Lord Esher, M. R., delivering the unanimous judgment of the Court of Appeal, disposes of this first point. The declaration of the Queen's Secretary of State is final; behind it the Queen's judges do not go.

The case furnishes a good illustration of the nature of judicial notice. The judge does not decide upon what he believes to be the fact, or upon what he knew about at the hearing, but a fact which from its nature can be ascertained without the assistance of counsel or pleadings is finally decided by another branch of the government, in whom by recognized principles of public law the decision of that question rests. The precise point to be decided is not the fact of sovereignty, but the relation of comity, which, independent of any facts, creates the exemption of the person recognized as a friendly sovereign. And the decision of that question by (in this case) the Colonial Office is final.

The plaintiff's second point is a weak but suggestive one. The argument was that the Sultan, by residing in England *incognito*, and there winning the plaintiff's affections, had waived his sovereignty and submitted to the jurisdiction of the courts; that he could not, in the language of Sir Robert Phillimore in *The Charkieh*, "assume the character of a trader, . . . and when he had incurred an obligation to a private subject, . . . throw off his disguise, and claim for the first time all the attributes of his character." It may well be doubted whether the alliance of a sovereign is not an act of State over which the courts should not take jurisdiction even when the defendant waives his right. But even if it be a private act, there is no force in any estoppel or waiver which can make a sovereign not a sovereign, or bar him from insisting upon his rights at all

times. The assumption of a right to estop is as great a step as any. Once take the jurisdiction to do that, and there is no ground for refusing to go on. On the strict principle of international law it would seem that in an action *in personam* by or against a foreign sovereign, a court act as arbitrators, without power to enforce his obedience; for even after judgment his extra-territoriality should not be violated by a friendly State. In an action *in rem*, on the other hand, jurisdiction, once obtained over the *rem*, might well subsist. See *The Charkieh* (cited *supra*); *United States v. Wilder*, 3 Sumner, 308.

BREACH OF PROMISE. — Such cases as *Mighell v. The Sultan of Johore*, *Van Houten v. Morse* (Mass. S. J. C. 1893), *Delia Keegan v. Russell Sage*, and *Zella Nicolaus v. George Gould* (N. Y.), and the evidence which they furnish of many other such cases settled out of court, do not show much justification for the action for breach of promise. Anomalous, practically an action of tort with heavy punitive damages claimed and often given, and used sometimes as a method of blackmail, sometimes as a means of expressing the indignation of all good jurymen against faithless swains, it forces the courts into a commercial view of what cannot properly be regarded as a matter of trade or dicker. It brings feelings not properly the subject of judicial investigation into undue publicity, and serves seldom as a real remedy for breach of legal obligation. Some years ago Lord (then Sir Farrer) Herschell proposed in the House of Commons, and Sir Henry James seconded, a resolution that "The action for breach of promise of marriage ought to be abolished, except in cases where actual pecuniary loss has been incurred by reason of the promise, the damages being limited to such loss." Here, in the United States, where a remedy and a punishment for seduction are generally provided, it would be interesting to have some one State at least adopt the spirit of this resolution. The similarity to other mutual agreements originally led the courts into allowing the action. As a fresh matter to-day it might well be doubted whether the commercial spirit is sufficiently apparent in the exchange of promises to show an intention of creating a contract in the sense in which contracts are enforced by the courts. The action seems peculiar to the common law.

If it is not to be abolished, at least the proof of the promise should be regulated. There is a serious lack of consistency in requiring written proof of a contract of sale of goods worth fifty dollars or so, and allowing a woman to recover forty thousand dollars or more on her own parol testimony, strenuously denied by the man. Yet such is the law.

MEANING OF "HIGH SEAS." — The Supreme Court, in *United States v. Rodgers*, has recently decided that the description, "high seas," in section 5346 of the Revised Statutes, gives jurisdiction to the Federal courts over the Great Lakes. The decision is based on the general use of the term in international law, and so has a wider interest than a mere interpretation of a statute. Justices Brown and Gray dissented, taking the position that "high seas" means only such waters as are open as of right to the commerce of the world.

In England the phrase "high seas" was used as practically co-extensive with the admiralty jurisdiction. But the fact that the Great Lakes are within the admiralty jurisdiction of the United States is not vital in

this case. This statute is to be construed as originally enacted in 1790. But down to 1851 it was not supposed that the Great Lakes were a part of the admiralty jurisdiction. The *Genesee Case*, 12 How. 453, in that year, finally settled that the Great Lakes were so included. The decision, then, can be reduced to the assertion that in 1790 a definition of these words would have covered the lakes, even though at that time they were not supposed to be within the grant of admiralty jurisdiction.

The Constitution gives Congress power to define and punish piracies and felonies committed on the high seas. Under this clause, could the United States undertake to punish a piracy committed on the Canadian half of Lake Superior? If it is a "high sea," such would seem to be the conclusion. Again, may European nations claim, on the established principles of international law, the right to maintain a fleet on Lake Michigan? Of course, such consequences are not to be seriously contemplated. The suggestion serves, however, to bring out the point that in the opinion of the court the term "high seas" has reference rather to the magnitude and commercial importance of the waters than to the rights of the nations of the world over them. Lake Michigan, though entirely within the territorial limits of the United States, and exclusively under its control, is nevertheless a "high sea" so far as this statute is concerned.

RECENT CASES.

ADMIRALTY — MARITIME LIEN — PROCEEDINGS IN REM IN STATE COURTS. — Hill's Code, § 3690, so far as it authorizes a proceeding *in rem* in the State courts to enforce a lien for necessary supplies furnished a vessel in her home port, is invalid, as it contravenes the Constitution of the United States, art. 3, § 2, and the Revised Statutes of the United States, §§ 563, 711, which give exclusive jurisdiction of such proceedings to the district courts of the United States. *Portland Butchering Co. v. The Willapa*, 34 Pac. 689 (Or.).

For a similar decision on this point see 7 HARVARD LAW REVIEW, p. 119.

AGENCY — EMPLOYER'S LIABILITY — RISK OF THE EMPLOYMENT. — The plaintiff, who was employed by the defendant as a blacksmith, was suddenly called from his work by one of the foremen of another department to assist in hoisting a heavy smoke-stack which was in position ready to be raised. The tackle being improperly adjusted, the stack fell and injured the plaintiff. *Held*, that the question was properly submitted to the jury to determine whether "the hoisting required peculiar skill or knowledge to perform it with safety;" the material point being whether the plaintiff under all the circumstances had sufficient experience to understand the hazards of the extra work which he was required to perform. *Coal Co. v. Hannie*, 35 N. E. Rep. 162.

For a discussion of the application of the maxim "*Volenti non fit injuria*," on which this case turns, see Beven on Neg. (1st ed.) p. 329 *et seq.* See also 14 Am. and Eng. Encyc. of Law (1st ed.), p. 861. About all that can be said about the doctrine and its application will be found in the opinion of the Law Lords in *Smith v. Baker* [1891], App. Cas. 325.

BILLS AND NOTES — ANOMALOUS INDORSER — JOINT MAKER. — *Held*, that a person who indorses a note before its delivery to the payee is presumed to assume the obligation of a joint maker, and that evidence of a contrary intention is not admissible as against an innocent transferee for value. *Salisbury v. First National Bank*, 56 N. W. Rep. 727 (Neb.).

The position of an anomalous indorser is in this case for the first time decided in Nebraska. There seem to be at least three distinct lines of decisions on this point. One class, including the majority of jurisdictions, holds, as in this case, that the obligation of the indorser is presumably that of a joint maker. This view is sustained by the following cases: 95 U. S. 90; 9 Ohio, 139; 99 Mass. 179; 35 N. J. Law, 517.

Other cases consider that the indorser, under these circumstances, is in the position of a guarantor. See 17 Ill. 459. A third class holds that he assumes merely the obligation of an ordinary indorser. This view seems to be the nearest in accordance with the intention of the parties, but it is adopted by only a few courts. See 19 N. Y. 227; 67 Pa. 380; 4 Sneed, 336. In a suit between the original parties to the note, parol evidence is almost everywhere allowed to rebut the presumption, and show the real intention of the parties as to the obligation assumed.

BILLS AND NOTES — INTEREST UPON A BOND AFTER MATURITY.—*Held*, where a bond specifies less than the statutory rate of interest, it draws only that specified rate after maturity. *Elmira Co. v. Elmira*, 25 N. Y. Supp. 657.

Parties may agree upon the rate of interest to be paid on overdue paper, and the sum agreed upon is liquidated damages. So where the obligation is to bear interest at a certain rate "until paid," interest will everywhere be allowed after maturity at the specified rate. *Taylor v. Wing*, 84 N. Y. 477. But where the agreement as to interest is in such general terms as not clearly to indicate what rate is to prevail after maturity, the whole question then becomes one of construction of the contract, and upon this construction there is a great conflict of authority. In *Holden v. Trust Co.*, 100 U. S. 72, the court held the statutory rate should prevail on overdue paper, even when the rate expressed in the contract was higher. 1 Sedg. Dam. (8th ed.) §§ 325-330, adopts the same view, and it is there said: "To imply a promise to pay the stipulated rate after maturity is . . . to introduce into the contract a provision which the language does not cover, and to violate both the principles upon which interest is given and the rules governing the interpretation of written instruments." One may perhaps question whether the parties could have intended a less rate of interest after the breach of their contract than before, and upon this ground may allow the stipulated rate to prevail after maturity, as in *Cecil v. Hicks*, 29 Gratt. 1, and *Brannon v. Hursell*, 112 Mass. 63, where it was greater than the statutory rate. But where it is less, to say that it shall prevail after maturity is not only to imply a promise, but to imply one which the parties would never have adopted. Though the New York decisions are not harmonious upon the point involved in the principal case, there are recent *dicta* in the Court of Appeals contrary to the result the case reaches; and we submit that it cannot be supported. *O'Brien v. Young*, 95 N. Y. 430; *Ferris v. Hard*, 135 N. Y. 365.

CARRIER'S LIABILITY FOR LOSS OF BAGGAGE — ACCEPTANCE OF TICKET.—Plaintiff's mother engaged passage on defendant's steamship for herself and plaintiff a week ahead, and received the ticket the day before the ship sailed. On the ticket was printed, in large type, "Cabin Passenger's Contract Ticket," and it was evident that it contained stipulations and regulations relating to the journey. One of these stipulations limited the liability of the company for goods including baggage to an amount not exceeding £10. This was relied upon by defendants in the action brought for loss of plaintiff's box. *Held*, that the acceptance of such ticket by plaintiff constituted an assent to its stipulations, though neither she nor her mother read them, since they had ample time to read them and object to the stipulations before the ship sailed. *Wheeler v. Oceanic Steam Nav. Co. Limited*, 25 N. Y. Supp. 578.

The court emphasizes the fact that plaintiff had ample time to read the conditions on which the ticket was issued, and, following *Zimmer v. R. R. Co.*, 137 N. Y. 460, distinguishes this kind of contract from cases of mere express or transfer companies, where the paper is delivered in a hurry, presumably without time to read and assent to the contents. In such cases the receipt is a mere voucher to enable the passenger to follow his property. In *Fonseca v. Steamship Company*, 153 Mass. 555, the court is of the opinion that the purchaser of a ticket, as in the principal case, must be considered as assenting to the stipulations on the ticket, and thereby making a valid contract, but that in Massachusetts a contract of this kind would be declared void as against public policy.

CONSTITUTIONAL LAW — MUNICIPAL ORDINANCES GIVING ARBITRARY DISCRETION.—By a city ordinance it was unlawful to carry on a tannery within the city limits without a permit from the common council, which they had discretion to grant or refuse upon a hearing of the parties. *Held*, the ordinance is unconstitutional. In order to be valid, it should have specified rules and conditions for the conduct of tanneries, instead of giving the common council arbitrary power of determining to whom the permits should be granted. *City v. Schultheis*, 35 N. E. Rep. 12 (Ind.).

One class of cases holds such ordinances invalid, because so unreasonable that the legislature could never have meant to authorize them; another, because the legisla-

ture could not authorize them constitutionally. In the principal case the question discussed is evidently one of legislative power. Probably the result reached was necessary in Indiana, in view of the previous case of *City v. Dudley*, 28 N. E. Rep. 312 (Ind.). That case relied mainly on *Baltimore v. Radecke*, 47 Md. 217, and *Yick Wo v. Hopkins*, 118 U. S. 356. In the former the question was not of legislative power, but of authorization of the municipality by the legislature. The court said, "We are of opinion there may be a case in which an ordinance passed under grants of power like those we have cited is so clearly unreasonable, so arbitrary, oppressive, or partial, as to raise the presumption that the legislature never intended to confer the power to pass it, and to justify the courts in interfering and setting it aside as a plain abuse of authority." *Yick Wo v. Hopkins* held that an ordinance making it illegal to carry on a laundry in any wooden building in San Francisco without the consent of the supervisors was invalid, since it was not within the legislative power under the fourteenth amendment. "The ordinance . . . does not prescribe a rule and conditions for the regulation of the use of property," said the court in that case. This expression has formed the basis of some subsequent decisions like *City v. Dudley* and the principal case, just as though final discretion under a legislative grant implied a grant of arbitrary power. In *Yick Wo v. Hopkins* the administration of the ordinance was, as the court held, sufficiently partial and bad to render the indictment in that case void by the fourteenth amendment under the doctrine of *Ex parte Virginia*, 100 U. S. 339, even though the ordinance was fair on its face. Although the absence of "regulations" is no doubt mentioned, the bad administration of this ordinance aimed directly at the Chinese seems to have been what really swayed the minds of the court. Especially does this seem clear in view of the case of *Crowley v. Christensen*, 137 U. S. 86, where the court held a city ordinance vesting discretion to grant licenses to sell liquor in the police commissioners constitutional. The ordinance in the principal case granted a hearing to all applicants for licenses to carry on tanneries. The discretion lodged in the common council was final, but how it was arbitrary seems hard to see. Final discretion must be lodged somewhere, and here it was in the common council. Beyond a doubt, if they refused to listen to an application, a mandamus would lie to compel them to pass upon the matter. The ordinance may have been unwise, but it is submitted that it was not beyond the province of the legislature to empower the city to pass such an ordinance vesting absolute discretion in the common council in the interest of the public health. To declare legislation unconstitutional whenever it is unwise is at once to transcend judicial authority, and to render the legislature utterly irresponsible as to the effect of its acts.

CONSTITUTIONAL LAW — REGULATION OF RAILWAYS BY STATUTE. — St. 1892, c. 389, requiring railroads to accept mileage tickets issued by other roads, which are to be redeemed when presented to the road issuing them, held unconstitutional, because (1) it enabled one railway to prescribe the conditions on which another shall carry passengers, and (2) it required a railway to take passengers on the credit of another road to which the money has been paid. *Attorney-General v. B. & A. R. R.*, 35 N. E. Rep. 252 (Mass.). Holmes and Knowlton, JJ., dissent.

CONSTITUTIONAL LAW — WEEKLY PAYMENT OF WAGES BY CORPORATIONS. — Held, that an act declaring that certain corporations "shall pay weekly each and every employe engaged in its business the wages earned by such employe to within six days of the date of such payment," and forbidding contracts for other times of payment, is unconstitutional, within the Constitution, art. 2, § 2, as depriving persons, without due process of law, of the property right of making contracts. *Braceville Coal Co. v. People*, 35 N. E. Rep. 62 (Ill.). See 7 HARVARD LAW REVIEW, p. 300.

CONTRACTS — BENEFICIARY — ATTACHMENT. — Where a policy of insurance is taken by a married woman on her own life for the benefit of her husband, and she pays the premiums out of her separate estate, the husband's interest in the policy on her death is purely equitable, and the insurance company cannot be charged as the husband's trustee or garnishee at the suit of his creditors. *Nims v. Ford*, 35 N. E. Rep. 100 (Mass.).

The husband had an equitable, not a legal claim against the company, and therefore his interest could not be garnished. In New York, where the "real party in interest may bring the action," the interest would be a legal claim, and therefore could be garnished, — an instance in which the Code of Civil Procedure would substantially affect the rights of the parties.

CORPORATIONS — RECEIVERS — PRE-EXISTING MORTGAGES. — The receiver of a water-works company has power to charge the corporate property to raise money to

meet current expenses, and such charge has priority over an existing mortgage. *Ellis v. Vernon Ice, Light, and Water Co.*, 23 S. W. Rep. 858 (Texas Sup. Ct.).

As a matter of principle, it is submitted this case can hardly be supported. It is, however, well settled by authority in most States, in accord with the decision reached by the Texas court. "It can hardly be questioned," says Mr. High (High on Receivers, 2d ed. § 398 c), "that the exercise of such a power impairs the obligation of the mortgage contract, and frequently results in the diversion of a large portion of the mortgage security. A power so dangerous, because so limitless, cannot be sustained upon any just principles of legal reasoning." The courts justify this extraordinary jurisdiction of a court of equity on the ground of expediency. The cause, however, must be urgent which demands the confiscation of the individual's property that the community may not suffer loss. Receivers clothed with such powers should only be appointed when the need is imperative. The abuse of this jurisdiction by courts of equity is a serious evil. Receiverships are too often indiscriminately granted on the petition of interested persons wishing to evade the mortgages, and unless the courts are in future more successful than they have been in guarding against this abuse, sooner or later the Legislature must interfere. The cases are collected in High on Receivers (2d ed.), p. 357.

CRIMINAL LAW—HOMICIDE—EVIDENCE.—On a trial for murder the wife of defendant, who had been seen with him at the time the murder was supposed to have been committed, was not in court, though known to be in the city. The counsel for the prosecution was allowed to comment on her absence. *Held*, reversible error. *Graves v. U. S.*, 14 Sup. Ct. Rep. 40. Brewer, J., dissenting.

For a discussion of this case, see the Notes in the present number of the REVIEW.

CRIMINAL LAW—TWICE IN JEOPARDY.—Stoner was taken before a justice of the peace upon an affidavit charging assault and battery, and was tried before a jury, who returned the following verdict: "Guilty, as charged in the affidavit, but in our opinion the punishment we are authorized to affix is not adequate to the offence." Said justice then held appellant for another trial, and he was subsequently indicted by the grand jury for assault and battery, with intent to commit a felony, tried and convicted. The case came up on appeal from the ruling in the court below, excluding the record of the proceedings before the justice of the peace. *Held*, that the conviction before the justice for simple assault and battery is no bar to a subsequent prosecution for the same assault and battery, with intent to commit felony, within the Constitution of the State of Indiana, art. 1, § 14, which provides that no person shall be put in jeopardy twice for the same offence. *Stoner v. State*, 35 N. E. Rep. 133 (Ind.).

The justice of the peace before whom appellant was first tried was by statute given jurisdiction to try misdemeanors punishable by fine only, not exceeding \$25. And the court decide that appellant was not thereby put in jeopardy, on the ground that the moment it appeared to such justice that the offence being tried before him was one which he could not adequately punish by a fine of that amount, his jurisdiction thereupon ceased, and he became merely an examining court with power to hold the accused for trial. Principals and authorities on this subject are confused and opposed, and it is perhaps one of the most troublesome questions to be met with in Criminal Procedure; this case, however, seems sound.

EVIDENCE—EXPERIMENTS—DEFECTIVE MACHINERY.—Plaintiff, an employee in defendant's brewery, brings an action for damages for an injury received in operating a machine, owing to its defective construction, and offers evidence that on a former occasion, while it was being operated by another, the machine exhibited the same defective working as when the plaintiff was injured. This evidence was admitted, under instructions to the jury that it was competent to prove the defective character of the machine and defendant's knowledge of the fact, but not as tending to prove any actionable negligence in the defendant. *Held*, that the evidence was properly received for the purposes stated by the court at the trial, and within the limitations there imposed. *Findlay Brewing Co. v. Bauer*, 35 N. E. 55 (O.).

This decision follows the weight of authority, and is in accord with the leading case on the subject, *Darling v. Westmoreland*, 52 N. H. 401, which is here cited and approved. The rule in Massachusetts, excluding such evidence for all purposes as concerning collateral facts only, rests upon the unsatisfactory authority of *Collins v. Dorchester*, 6 Cush. 396, referred to and distinguished in *Darling v. Westmoreland*, *supra*.

INSURANCE—CONDITION OF POLICY—LIMITATION OF ACTION.—An insurance policy contained these conditions: (1) that no action on the policy should be brought unless within six months after the occurrence of the fire; and (2) that the loss should

not become payable until sixty days after the proofs of loss were received by the company. *Held*, that a suit upon the policy may be brought at any time within six months after the expiration of the sixty days after proofs of loss have been submitted. *Fireman's Fund Insurance Co. of California v. Buckstaff*, 56 N. W. 697 (Neb.).

It is difficult to see, on grounds of reason or convenience, why the courts should refuse to enforce, according to its terms, a condition, like the first, expressly imposed and assented to; but there is no doubt that this decision represents the law generally. See *German Ins. Co. v. Fairbank*, 32 Neb. 750, and authorities there cited.

MANDAMUS — ATTORNEY-GENERAL — MINISTERIAL DUTIES.—Laws 1893, c. 725, § 10, provide that a certificate of authority shall not be granted to a proposed insurance company until the declaration and charter submitted to the superintendent of insurance "shall have been examined by the attorney-general, and certified by him to the superintendent to be in accordance with the requirements of the law." *Held*, that the duty thus imposed on the attorney-general is ministerial, though he is required to pass on questions of law in order to discharge it, and he will be compelled by mandamus to give the certificate, where the incorporators have complied with the law. *People ex. rel. Woodward v. Rosendale*, 25 N. Y. Supp. 769.

That the determination of the question whether a corporation has complied with the statutory requirements, though involving a decision on a point of law, is a ministerial duty, admits of little doubt.

MUNICIPAL CORPORATIONS — LIABILITY FOR GOVERNMENTAL ACTS OF AGENTS.—The plaintiff, proprietor of a circus, had obtained permission of persons purporting to own a plot of ground to give an exhibition thereon, and had obtained a license from the defendant city. Afterwards the mayor and police refused to allow the circus to be given there, claiming that the land had been used as a public graveyard and had been dedicated to the public. *Held*, that the city was not liable for the acts of the mayor and the police, as they acted not as officers of the city in its corporate capacity, but as servants of the public in preventing the perpetration of a nuisance. *City of Kansas City v. Lewen*, 57 F. Rep. 905.

Case is interesting as rather a novel instance of the twofold duty of a municipal corporation, — the one political, springing from its sovereignty; the other private, arising from its existence as a legal person. For the conduct of its officers in its former capacity it is not liable; in its latter capacity it is. See 2 Dillon, Mun. Corp. (4th ed.) §§ 974, 975.

PUBLIC OFFICERS — DAMAGES FOR THEIR FRAUDULENT ACTION.—*Held*, the lowest and best bidder for the construction of a road under a statute cannot maintain an action for damages against the county commissioners, engineer, and superintendent, individually, for fraudulently and collusively rejecting his bid, and awarding the contract to other persons at higher prices, since these officers owed no special duty to plaintiff in making the award, except such as they owed him in conjunction with other citizens of the community. *Lane v. Board of Comm'rs of Boone County*, 35 N. E. Rep. 28 (Ind.).

The decision is based on the ground that the defendants owe plaintiff no special duty; but it may be questioned whether a public officer is not under a special duty to those who deal with him in his official capacity to deal honestly with them. It must be conceded, however, that this decision is in accord with the majority of decisions on similar points. Mechem on Pub. Off. §§ 598, 614. It would seem that the plaintiff is not wholly without remedy, the court suggesting that the defendants might be enjoined from awarding the contract to the other builders, or that they might be compelled by a writ of mandamus to award it to the plaintiff. But as to granting a writ of mandamus to compel the award of a contract to the lowest bidder, see Dillon on Mun. Corp. § 852, note 2.

REAL PROPERTY — ADVERSE POSSESSION.—In an action of ejectment plaintiffs claimed title by adverse possession. There was no definite evidence that the boundary was located, fenced, etc., by the plaintiffs; but the court said that even if it was clearly shown that such was the case, plaintiffs could not recover, as they had no intention to claim beyond the true boundary. *Silver Creek Cement Co. v. Union Lime and Cement Co.*, 35 N. E. Rep. 125 (Ind.).

This is merely a *dictum*, but it shows the inclination of another court to go against what is submitted to be the correct view. What a man does, he intends to do; so, if he fences in land, he intends to claim it. See 7 HARVARD LAW REVIEW, pp. 241, 242. Two of the three authorities cited by the court do not sustain the proposition laid down. *Finch v. Ollman*, 16 S. W. 863 (Mo.), went on the ground that the evidence of

adverse possession was not sufficient. *Mfg. Co. v. Packer*, 129 U. S. 688, decided simply that a man is not estopped to set up the true boundary, if he has assented to the running of a false one under a misapprehension and with no intention of settling a boundary. The Iowa case cited has little weight, as it follows *Grube v. Wells*, 34 Ia. 148, which settled the law on this subject for that State in 1871.

REAL PROPERTY — JOINT TENANTS — STATUTES. — *Held*, that under a statute concerning landlords and tenants, any one of a number of joint tenants or tenants in common named as landlords, is authorized to make demand in writing for the payment of rent, and sign and give the three days' notice required by the statute to confer jurisdiction in summary proceedings to dispossess the tenant for default in the payment of such rent. *State v. Klein*, 27 Atl. Rep. 902 (N. J.).

The opinion of Lippincott, J., in this correctly decided case contains an excellent discussion of decisions bearing upon the rights of joint tenants and tenants in common as against their lessees.

REAL PROPERTY — MORTGAGES — BONDHOLDER'S EXEMPTION FROM TAXATION. — The Public Statutes of Massachusetts, chap. 11, § 4, provide that "any loan on mortgage of real estate which is taxable as real estate" is not included among debts taxable as personal property. Under this provision it was *held* that bonds secured by a real-estate mortgage to trustees, though bought in the market, were exempt from taxation within the meaning of the statute. *Knight v. City of Boston*, 35 N. E. R. 86 (Mass.). Field, C. J., Morton and Allen, JJ., dissenting.

It will be seen that the decision involved simply a construction of the statute; and though the construction given by the majority of the court was very liberal, yet it seems a reasonable one, and further a very desirable one, as it prevents double taxation, the difficulty which the statute was enacted to meet.

TORTS — CONTRIBUTORY NEGLIGENCE — DUTY OF A PASSENGER. — *Held*, a passenger on a street-car which has stopped at a railroad crossing to permit a locomotive to pass is not bound to be on the lookout, when the car starts, for other approaching engines; and his failure so to do is not contributory negligence which will prevent his recovery from the railroad company for injuries sustained in a collision between the car and another locomotive, though, if he had looked, he might have seen the approaching engine in time to have jumped from the car. *O'Toole v. Pittsburgh & L. E. R. Co.*, 27 Atl. Rep. 737 (Penn.).

It is submitted that this decision is clearly correct. The duty of looking and listening in such a case does not rest on a passenger in a public conveyance, nor can the negligence of its driver be imputed to him. A passenger in a public conveyance is under no duty of watching for possible collisions. *McCollum v. Long Island R. Co.*, 38 Hun, 569.

TORTS — CONVERSION — MEASURE OF DAMAGES. — The trial judge instructed the jury that the measure of damages for the conversion of a cart was the value of the cart at the time of the conversion, together with the reasonable value of the use up to the time of the trial. To this instruction the defendant excepted; but *held*, that it was correct; that the object of judgment was to recompense the plaintiff, and in this case the value of the cart, with interest, would by no means have placed him in the position he occupied before the conversion. *Moore v. King*, 23 S. W. Rep. 484 (Tex.).

The above decision would seem to bring about equitable results; but according to the weight of authority the measure of damages for the conversion of personal property is the value of the property at the time of the conversion with interest. 2 Sedgwick on Damages (8th ed.), § 493.

TORTS — LICENSEES — DANGEROUS PREMISES. — Plaintiff, a teamster, delivered goods at the back door of defendant's store, and, starting through the store to the desk to get a receipt, he fell through a trap-door which had been left open. Every teamster always took a receipt for goods delivered on the premises, and if there was no one to sign it at the back door, the teamster called out until some one appeared. *Held*, plaintiff cannot recover, as "there was no invitation, or nothing even that implies a license, to cross. There is proof to show that the intention was that the goods should be received by defendants at the door, and there examined and receipted for; and the practice was for the truckmen to make their presence known by calling." *Pelton v. Schmidt et al.*, 56 N. W. 689 (Mich.).

This case is almost on the line. Of course, when one opens a shop, he gives an implied license to every one to come into the store for business purposes in the ordinary way. It may well be questioned whether the back door is the ordinary way. The very

fact that there was a large trap-door just inside the door would go to show that the occupier intended no one to come in there for business purposes, except his employees. Then, even though a man opens a store and so gives an implied license, *prima facie*, as above, he may limit it by restrictions as to the use of the premises. A number of the cases cited by the court are of that nature. Where the restrictions were imposed by subsequent express regulations, certainly there may be a limitation put on the license that would ordinarily be implied as well by usage, if well established, as by express prohibitions. Taking the above two points into consideration, the case seems rightly decided. It seems to be a new case among the various forms that these "invitation cases" assume.

TRUSTS — REGISTRY ACTS — INTENTION OF THE PARTIES. — Partners purchased land with firm property, taking the conveyance in the name of one, in whose name the deed was recorded. Afterwards that partner borrowed money from the defendant on his personal account, and gave a judgment note therefor, which was entered of record against the land. *Held*, that the fact that the land was paid for by firm property raised no resulting trust in favor of the firm, since, where it is the intention of the partners to bring real estate into the partnership stock, the intention must be manifested by deed or writing placed on record, that purchasers and creditors may not be deceived. *Gunnison v. Erie Dime Savings Co.*, 27 Atl. Rep. 747 (Pa.).

The decision, it is submitted, is sound. Trusts arising by operation of law were not within the provisions of the Statute of Frauds. But it is necessary to keep in mind the distinction between such trusts and those that spring from the intention of the parties. If A pays the purchase money for a conveyance of land to B, there is a common law presumption that A intended that B should hold the land in trust for him. This presumption is however but a substitute for evidence; for if B can prove that A meant to make him a gift, then the trust fails. Such a trust is obviously one arising from the intention of the parties and not by operation of law. Yet on account of this *prima facie* presumption, which in most instances is not rebutted by evidence, the courts have come to look upon cases like this as examples of implied trusts, though the law, instead of implying the trust, implies the parties' intention, which the courts carry out. In the absence of fraud, such a trust might well be held to be within the force of the statute. It would seem clear that trusts arising from the intention of the parties are within the spirit of the registry laws, especially in those States where express trusts must be recorded; and if they are not recorded, creditors of the ostensible owner can attach the property as his. Hence the decision in the principal case.

TRUSTS — RESULTING TRUSTS. — A, wishing to sell land, employed complainant as broker; and it was agreed between them that in lieu of commissions for the sale complainant should be entitled to a specific portion of the land. Subsequently respondent decided to buy the land; and it was agreed between A, complainant, and respondent, which specific land complainant should receive for his services. To save a multiplicity of deeds, and for other reasons, it was arranged that A should convey to respondent all the land, and that respondent should then convey to complainant the parcel which had been previously agreed upon as going to him. A conveyed in accordance with this arrangement, but subsequently respondent refused to execute a conveyance to complainant of that part to which, by the agreement, he was entitled. *Held*, a trust results in favor of the agent as to such specific portion, since the consideration therefor moved from him in the shape of services rendered in effecting the sale. *Aborn v. Searles*, 27 Atl. Rep. 796 (R. I.).

Respondent in this case had got title to a specific piece of land for which complainant had paid, and it is a well-settled doctrine in England and a great majority of the United States that the party taking title under such circumstances holds it in trust for him who paid for it; the reason for the doctrine being that the man who pays the purchase money intends to become the owner, and the beneficial title follows that supposed intention. The great majority of cases arise where money has been paid, which therefore differ in this respect from the principal case, which is one of services rendered. The law in both cases is the same. 10 Am. & Eng. Enc. Law, 9, and cases cited.

REVIEWS.

AN ESSAY ON JUDICIAL POWER AND UNCONSTITUTIONAL LEGISLATION: Being a Commentary on Parts of the Constitution of the United States. By Brinton Coxe, of the Bar of Philadelphia. Philadelphia: Kay & Brother. 1893. Octavo, pp. xvi, 415.

This important contribution to a vitally important subject is a posthumous fragment from the hand of the lamented translator of Güterbock's "Bracton, and His Relation to the Roman Law," — published in 1866. It is edited by Mr. William M. Meigs, of the Philadelphia Bar, a writer favorably known to the profession and to students of constitutional law by various publications, especially an article on "The Relation of the Judiciary to the Constitution," in the nineteenth volume of the *American Law Review*, p. 175, containing the most thorough and trustworthy account of our early constitutional decisions which is to be found anywhere.

Mr. Meigs explains in a preliminary note that what is now published is but the first part of what Mr. Coxe planned. It is a historical introduction or commentary, and was to be followed by a "Textual Commentary." The first part was left by its author electrotyped; we have it, therefore, presumably as he meant it finally to stand. The second part is too incomplete for publication. This is much to be regretted, for the author himself tells us (p. 47) that "it is the most important part of the work, and the one to which the other parts lead up." The editor, however, gives an outline of this second part in his "Note." The main proposition of it is that the Constitution of the United States *expressly* gives to the courts the power of disregarding unconstitutional Acts of the legislature. To some this will seem no new suggestion; it is common to say this, — and to found it upon the second clause of article six. But Mr. Coxe recognizes, what is overlooked by most persons, that this clause, taken alone, and taken only in its *obvious* meaning, relates merely to the control of the courts over State action. In order to make out his point, he ties together this and the second section of article three, — the one making the judicial power of the United States extend to all cases arising under the Constitution and laws of the Union. Without undertaking here either to state fully or to controvert Mr. Coxe's argument as to this, his main point, it may be doubted whether he has established it. That the Constitution in terms gives to the State and Federal judiciary the power to apply the Federal Constitution as law controlling State legislation, must be admitted; that it is matter of just inference to hold a like view as regards Federal legislation, is also well made out. But it may reasonably be thought that the Constitution has not *expressly* given to the judiciary the power to disregard unconstitutional Acts of Congress, and it may be surmised that this express giving of the power was purposely avoided, — as in some other cases, where Madison intimates, and even says in terms, that the Constitution was silent from motives of expediency, of set purpose leaving a given result to be reached by inference and construction.

What appears to us to be the conspicuous merit of this book is its powerful reinforcement of the sound inferential argument for the judicial

power, by a learned and sagacious historical consideration of English, Continental, and colonial precedents. Mr. Coxe fully admits the fact that at the period when our constitutions were made, the theory of parliamentary omnipotence was well established. But he points out that this had not always been so; and the older precedents, relating to the Church and the royal prerogative, show that English law had once been no stranger to the doctrine that an Act of the highest legislature might be judicially held invalid.

In considering the great colonial case of *Winthrop v. Lechmere*, it appears to us that Mr. Coxe abandons quite too readily the view that it involved a *judicial* declaration of the invalidity of the colonial Act. But there is not space to give the reasons for that opinion.

The author deserves thanks for pointing out the bad inaccuracy of the reporter's list of "cases in which the Supreme Court has decided Acts of Congress to be unconstitutional," given in Part A of the Appendix to volume 131 of the United States Supreme Court Reports. In speaking of the omissions in the list, Mr. Coxe remarks that of the *Dred Scott* case. There are reasons for omitting that case to which he does not advert, but there was at least as much reason for inserting it as in the case of two or three others that are there.

Mr. Coxe is sometimes whimsical, and sometimes his comments are hardly those of a lawyer; his style of expression is here and there quite eccentric, and he repeats himself; he is sometimes guilty of squeezing his grapes too hard; and sometimes he gives his reader too little credit for intelligence, and spins out his exposition too much. But the book is still the work of a man of extraordinary intelligence, learning, accuracy, and thoroughness, — a helpful and illuminating book, — and it will be received with grateful appreciation by careful students of constitutional history and law.

J. B. T.

DIGEST XLVII., 2. DE FURTIS. WITH TRANSLATION AND NOTES BY
C. H. MONRO, M. A., Cambridge, England: University Press. 1893.
12mo, pp. vii, 128.

The text, translation, and notes, in distinctive type run together on the pages, each comprising about a third of the book. The attempt is to present the sources as such to students, so that many doubts are left unsolved and most words of art left untranslated, rather than that the translator should do the students' work, or destroy by translation the connotation of words which have no accurate English equivalent. The notes give references to other sources and other parts of the Digest.

It is gratifying that the revival of the study of the civil law in England should bring such careful and scholarly work as its latest fruit. Certainly a translation done in this manner of those parts of the Digest which bear by analogy on our modern law would do much towards removing the present lack of interest in this body of famous jurisprudence, which might well furnish the profession with both analogy and argument. This is a good precedent, and will be an example to those who follow it, of the way in which the work should be done.

R. W. H.

LEGAL STUDIES IN THE UNIVERSITY OF OXFORD. A Valedictory Lecture by James Bryce, D. C. L. Macmillan & Co., 1893.

Though the chief interest of this address must be for members of the University of Oxford, it will be read in this country also with the same pleasure and profit which the other writings of Professor Bryce have afforded. The main emphasis is laid on the importance of the civil law, a study of which he believes should be included by the student in his preparation for the practice of the common law. A hint at the position of university legal studies in England is given by the regret expressed at the fact that the men after receiving their B. A. degree do not enter the law school for professional legal studies as they do in America.

E. B. B.

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NO. 7.

RESPONSIBILITY FOR TORTIOUS ACTS: ITS HISTORY.— II.

Harm Done by Servants and other Agents : 1300-1850.

IN a former article¹ we found that the primitive Germanic idea was that the master was to be held liable absolutely for harm done by his slaves or servants ; that, in later Germanic times, the master could exonerate himself by surrendering the offending person, and at the same time taking an exculpatory oath, "se non conscium esse," "quod pura sit conscientia sua ;" that, on English soil, in the early Anglo-Norman period this idea of responsibility appears in the shape of exoneration for deeds of the servant not commanded or consented to ; but that in that period the test of Command or Consent had hardly begun to be applied to responsibility in what we now term its civil aspect,² and, while common in penal matters, was by no means fixed in its scope. The subsequent development of the idea we may now take up in three stages : (1) the period beginning with Edward I.'s time, 1300 *circa* ; (2) the period beginning with Lord Holt's time, 1700 *circa* ; (3) the period beginning with Lord Kenyon's time, 1800 *circa*. Speaking provisionally and roughly, these stages stand for the

¹ Vol. vii. p. 315.

² We find as late as Finch's *Law* (1654 ; ed. 1759, p. 198) the statement, "trespass is a criminal offence punishable by a fine unto the king ;" and it is perhaps unsafe to draw any distinction of "civil" and "criminal" in the present connection till the seventeenth century.

following phases : (1) the extension of the Command or Consent test to civil responsibility ; (2) the test of Implied Command from General Authority ; (3) the test of Scope of Authority or Course of Employment. We may now take up the evidence of this development.

I.

It will be apparent, it is believed, to one who studies the following cases ¹ that for a century or so the undercurrent of feeling was still that the master bore responsibility for his servant's doings ; that the extension of the Command test had to make its way against what may be called the presumption to the contrary, and that it came first in cases (such as fraud) more nearly related to the sort of conduct to which it was already recognized to apply, *i. e.* morally reprehensible, criminal acts ;² and that it can hardly be found to be accepted as a general rule in trespass, etc., until early in the sixteenth century.

1302. *Y. B.* 30-31 *Edw. I.*, 532 (Rolls ed.). — Hugo is charged with rape. *Duodecim* : "Nos dicimus quod ipsa rapiebatur vi per homines domini Hugonis." *Iusticiarius* : "Fuit ne Hugo consentiens ad factum vel non ?" *Duodecim* : "Non." . . . *Iusticiarius* : "Hugo, quia ipsi vos acquietant, nos vos acquietamus."

1302. *Y. B.* 30-31 *Edw. I.*, 203 (Rolls ed.). — A poor woman complained of frequent distresses by B. The inquest "said that the woman's son, who was of her mainpost [household], had done damage in B.'s wood." Berrewik, J. : "And inasmuch as he did wrong to distrain the woman for [the deed of] her mainpost," B. was found guilty.

1305. 33 *Edw. I.*, 474 (Rolls ed.). — Writ of covenant by Henry de Bray, a tenant against his landlord, a knight, for disseisin. The inquest found that the knight's lady had come with her friends, and the plaintiff, departing in fear, left her in possession "without that Master Henry was ousted by the knight himself or his counsel." The Court held that, "inasmuch as the deed of the wife is the deed of the husband, it is awarded that Master Henry recover these damages of 100 marks."

1306. *Y. B.* 34 *Edw. I.*, 252 (Rolls ed.). — Trespass for taking beasts ; justification as bailiff of the abbot of W. Tondeby, for plaintiff : "You cannot say that ; for the abbot himself is also named in this writ, and he has already pleaded and said not guilty ; and since he in whose name you have acknowledged the taking has disavowed it, [we pray] judgment

¹ Which include, perhaps, not all that are on record, but all that the writer has found, and apparently all that judges and counsel have relied on in decision and argument.

² See note 2, p. 383.

and damages." [Here apparently the disavowal of complicity was regarded as sufficient evidence for the abbot under "not guilty," as Bracton declares, *ubi supra* (p. 334)].

1353. *St. 27 Edw. III.*, 2, c. 19. — "No merchant nor other, of what condition that he be, shall lose or forfeit his goods nor merchandizes for the trespass and forfeiture of his servant, unless he do it by the command or procurement of his master, or that he hath offended in the office in which his master hath set him,¹ or in other manner that the master be holden to answer for the deed of his servant by the law merchant, as elsewhere is used." [Apparently this is the first positive modification in civil matters. Here, as often elsewhere, mercantile convenience is earliest in calling for new adjustments.]

1401. *Beaulieu v. Finglam*, Y. B. 2 H. IV., 18, pl. 6. — Action for damage caused by the defendant's fire.² Markham, J.: "A man is held to answer for the act of his servant or of his guest in such a case; for if my servant or my guest puts a candle on a beam, and the candle falls in the straw and burns all my house, and the house of my neighbor also, in this case I shall answer to my neighbor for the damage which he has, quod concedebatur per curiam." Hull, for the defendant: "That will be against all reason to put blame or default in a man where there is none in him; for negligence of his servants cannot be called his feausance." Then the traditional misfortune-liability is cited in answer. Then Markham, J.: "I shall answer to my neighbor for him who enters my house by my leave or my knowledge, or is entertained by me or by my servant, if he does, or any one of them does, such a thing . . . ; but if a man from outside my house, against my will, puts the fire . . . for that I shall not be held to answer to them, etc., for this cannot be said to be through ill-doing on my part, but against my will."

1431. 9 H. VI., 53, pl. 37. — Action for selling bad wine. Plea, that he sold it through his servant. Martin, for the plaintiff: "Of your own knowledge you have deceived him (the plaintiff)." Rolf, for the defendant: "If I have a servant who is my merchant, and he goes to a fair with an unsound horse to sell it, shall the party have an action of deceit against me? No." Martin: "You are right; for you did not order him to sell the thing to the other, nor to any particular person; but if your servant by your covin and commandment sells bad wine, [the buyer] shall have action against you; for it is your own selling; and if the case is that you did not command your servant to sell to that person, then you may allege that you did not sell to the plaintiff." [The decision is not given; but the precedent has been accepted in the sense of Martin's statement of the law. Cf. *Danvers' Abr.*, "Act. on Case," fol. 184;

¹ For the presence of this clause and the significance of its phraseology, see *infra*, p. 19, note 2.

² The translation is that of Mr. Justice Holmes.

Lilly's Practical Register, "Disceit;" and the arguments in later cases.]

1443. 21 *H. VI.*, 39, *pl.* 6. — Trespass for grass trodden and spoiled by the defendant's beasts. Markham for defendant: "We say that the plaintiff, with the intent of damaging the defendant, commanded one of his own servants to drive the defendant's beasts into the [plaintiff's] grain, wherefore he [the servant] by his commandment drove them into the said grain, and the defendant, as soon as he had notice of it, drove them out of the said grain and grass." Yelverton for the plaintiff: "This plea amounts only to not guilty; for if one by my covin and commandment takes the goods of another person, or beats him by my commandment, the writ is maintainable against him who did it and me . . . ; thus here by his [the defendant's] own statement the plaintiff himself did the trespass . . ."

1471. 10 *Edw. IV.*, 18, *pl.* 22. — Trespass for false imprisonment; plea, that the defendant handed the plaintiff over to the authorities; objection, that he was still responsible for the subsequent letting at large. Choke, J.: "And if the defendant had delivered the plaintiff to jail by [the hands of] his servant or other man, who had suffered the plaintiff to go at large, etc., never should the plaintiff have action against the defendant, etc., *quod curia concessit.*"

1472. 11 *Edw. IV.*, 6, *pl.* 10. — Action of deceit on a guarantee as to the length of cloth bought of the defendant. Plea, that the cloth was B.'s, and was sold by the defendant as servant of B. Choke, J.: "Here the sale is the sale of the master, and the guaranty the act of the servant, wherefore on this guarantee I shall not have an action against the servant. If a man takes upon himself to cure me of a certain illness, if he gives such medicine that I am injured, I have an action on my case against him; but if he undertakes as above, and then commands [maunde: order, command] his servant to administer the medicine to me, and he emplasters or medicates me, by which I am injured, I shall not have an action against the servant, but against the master. And so if he undertakes to shoe my horse, and orders [his] servant [to do it] who 'nails' [the horse], the action lies against the master." Littleton, J., was opposed: "Although this sale is the sale of the master, yet it is done by the servant," etc. Brian, J., agreed with Choke: "But, sir, it seems that the action of deceit does not lie in this case, for it is the sale of the master."

1497. *Keilwey*, 3 b. — "Where my wife or my servant, without my knowledge, puts my beast on another's land, who brings a writ of trespass against me for depasturing his grass with my beasts, — if I plead not guilty, I cannot give the special matter in evidence, because it is contrary to the issue . . . which was conceded by the whole court. And it was besides said at the same occasion that where my beasts, of their own wrong, without my will and knowledge, break into another's close, I shall

be punished, for I am the trespasser with my beasts, which was also agreed to as law, because I am bound by law to keep my beasts without doing harm to any one." [Here the significance of the Consent test is emphasized by the "diversity" stated.]

1498. 13 *H. VII.*, 15, *pl.* 10. — "It was held in Common Bench, if my servant, against my desire, chases my beasts into the land of a stranger, I shall not be punished for this, but my servant; otherwise if my beasts escape against my desire, for I shall there be punished. *Quære*, if I keep a dog, and my servant against my desire incites and causes the dog to bite and kill the beasts of a stranger, whether I shall be punished for this."

1505. 20 *H. VII.*, 13, *pl.* 23. — Trespass for false imprisonment; justification as bailiff by command of the sheriff under a writ; the sheriff had neglected to return the writ, and this was objected to as defeating the plea. Rede, C. J., "to the contrary. For there is no default in the bailiff. . . . For suppose that the master commands the servant to distrain, and so he does it and takes [the distress] to his master, and the master misuses it, is it reason to punish the servant? No, surely; and so no more here. And if the master commands the servant to distrain, and the servant does so, it is not reason, if the servant misuses the distress, that the master should be punished by cause of his command, which was lawful in the beginning; wherefore, on the other hand, [in this case also] the law should be all one."

1506. 21 *H. VII.*, 22, *pl.* 21. — Same facts as in 20 *H. VII.*, *supra*; probably the same case adjourned. Rede, C. J., holding the defendant excused "since every bailiff and every servant is bound to do the precept of his master in all that is legal," and showing that "there is a defendant in his master, in whom the default is," says: "As if I command my servant to take a distress for my rent, and he does it and leads the distress to me, and I kill it, or do other illegal thing with it, in this case the servant is excused; and, on the other hand, where I command my servant to take the distress legally, and, he rides on the distress, in this case he shall be punished, and I excused, for that when I command him to do a thing legally, and he does contrary to the commandment, he does a wrong to which I did not assent [agreea]; it is reason to punish him and to excuse me, and so here. . . ." ¹

¹ Cf. 8 *Edward IV.*, 17, *pl.* 24 (1469); where the general understanding seems clearly in accord; and the doctrine of cases like 11 *Henry IV.*, 91, *pl.* 47 (1410); where, on the defendant's writ against J., the bailiff erroneously took the horse J. was riding, which was in fact the plaintiff's, and both judges declared that the error was not to be charged against the defendant without an allegation that it was "by covin and contrivance" of him; or "at his showing or request." There is strong reason for believing that by this period the law of master's responsibility for servant had come to be regarded as merely one form of the general principle thus stated in "Doctor and Student," I. c. 9 (p. 31): "The law of England is that if a man command another to do a trespass, and he doth it, that the commander is a trespasser."

1518. *Doctor and Student*, II., c. 42 (Muchall's ed. 233). — "For trespass of battery, or wrongful entry into lands or tenements, ne yet for felony or murther, the master shall not be charged for his servant, unless he did it by his commandment. . . . Also if a man send his servant to the market with a thing, which he knoweth to be defective, to be sold to a certain man, and he selleth it to him, therè an action lieth against the master; but if the master biddeth him not to sell it to any person in certain, but generally to whom he can, and he selleth it according, there lieth no action of deceit against the master." p. 234. — "If a man desire to lodge with one that is no common hostler, and one that is servant to him that he lodgeth with robbeth his chamber, his master shall not be charged for the robbing; but if he had been a common hostler he should have been charged. . . . But that an host or keeper of a tavern shall answer for their guests, unless it be done by their assent and commandment, I do not remember that I have read it in the laws of England."¹

1525 circa. — *Treatise on Subpœna* (1 Hargr. Law Tracts, 347): "Also if a man's servant thro' negligence of his maister, tho' it be not by his commandement or assente, but for lacke of correction, do offences and tresspasse to his neighbour, whereby the master is bound in conscience to make restitution if his servante be not able, yet there lieth no subpœna againste the master to compel him to it."

1589. *Seaman v. Browning*, 4 Leon. 123. — Debt on an obligation with a condition for peaceable enjoyment of lands, and a breach assigned in that trees were cut down. "It has [was?] found that a servant of the said M. [the obligor] had entred and cut them, and that in the presence of the said M. his master and by his commandement; it was the opinion of the Court that the condition was broken, and that the master was the principall trespasser."²

It has been suggested by Professor J. B. Ames that the notions on which rested at this period the principal's liability for another's contracts might throw light on the present question; and there seems indeed good reason for believing that the prevailing test was an analogous one, *i. e.* that the master was liable if either he had commanded the making of the contract or had accepted the proceeds, *i. e.* had assented. The writer, however, has not thought it allowable, in the demonstration of the present point, to insist on the value of the analogy. Compare, for contracts, *Noy, Middleton v. Fowler*, and *Ward v. Evans*, *infra*, and the following case: —

1307 — *Y. B. 35 Edw. I. (Rolls Ed.)* 567. In Debt against an abbot and monk on a writing of the monk only, alleging that the money and a horse sold came to the profit of the house, it was apparently conceded that where the monk was an absconder and had gone off with the things received, the abbot could not be charged "for the act of his monk."

¹ We find also in this treatise a repetition, in distorted form, of the precedent in 2 H. IV., *ante*: "If the servant keep the master's fire negligently, whereby his master's house is burnt, and his neighbour's also, there an action lieth against the master. But if the servant bear fire negligently in the street, and thereby the house of another is burnt there lieth no action against the master" (p. 234).

² Compare here also *Lord North's Case*, Dyer, 161 a (1557), where Lord North was

1606. *Waltham v. Mulgar*, Moore, 776. — Action against the owner of a privateer which captured a friendly ship. A civilian solicitor argued for an absolute responsibility of masters "in public affairs." "He who has put a ship in traffic should provide servants who will not commit public offences." But Popham, C. J., said: "Where the master put his servant to do an illegal act, the master shall answer for the servant if he mistakes in the doing of the act; but where he put his servant to do a legal act, as here to take the goods of the king's enemies, and he has taken the goods of friends, the master shall not answer. As if one sent his servant to a market to buy or sell, and he robs or kills by the way, the master shall not answer; but if he sets him to beat some one, and he kills him or mistakes the person and beats another, the master is a murderer. So with rescous or trespass."

1618. *Southern v. How*, 2 Rolle's Rep. 5, 26:¹ — Case for sending by the defendant's servant to the plaintiff some jewels, known to be counterfeit (worth £80, the jury said, but the price was £800), for sale to the king of Barbary, by which the plaintiff fared ill at the hands of the said king when the cheat was discovered. For the plaintiff it was argued that where the vendor knows the fault, the fact that he has a servant do it is immaterial, using (1) the Saunders Case (Comb. 473) of the poisoned apple and (2) the Bad Wine Case (9 H. VI., *ante*). The defence argues that the master did not order the servant to commit the fraud, that he was "san privy;"² and although a general authority to a factor suffices to charge the master, yet not if the factor commits a fraud. Then the plaintiff's counsel argued from 11 Edw. IV., 6, A, using Choke's example, of the physician and the blacksmith. To this the defence answers that the command here was not directed particularly to the plaintiff, "and thus the command is general, and no deceit was intended specially towards the plaintiff;" but, it was answered, "where damage is aimed against all in general, yet if I afterwards come [*aveigne*] to any particular man to his prejudice, yet I shall have an action. . . . But admitting that in any cases action does not lie against the master for the tort of his servant, yet here . . . he has a profession in which he ought to take servants for whom he can answer. . . . Though the servant does not follow his master's command in all points, but varies from it in some little things for the better accomplishment of his master's command, this will not change the case, for when one commands a thing to be done, he impliedly commands all means to be used for doing this."³ Then Coventry for the

held liable for a bond fraudulently surrendered back by his servant to the obligor; "for the possession of the bond in him or in his servant *by his order*, was to the use of the king and he was charged to render it back."

¹ In Popham, 143, the same distinction is reported briefly, but pointedly.

² Compare the "*se non conscium esse*" of the earlier law.

³ Here first apparently is found the suggestion of the amplified form of the doctrine as accepted in the 1700s. Compare Blackstone's language, *infra*.

defence says that the jeweller was personally guilty of no intention to commit fraud, for the jewels were worth £80. "There is a distinction between the master's command of a lawful and of an unlawful thing, as if I command my servant to disseise J. S. and he disseises him with force, I shall be punished for the force; but if I command him a lawful thing and he exceeds his authority, I shall not be punished for the excess;" citing 11 Edw. IV. 6; 9 H. VI. 53; Doctor and Student, 137; 13 H. VII., 15.¹ Mountague, C. J., agreed with Coventry "en tout." Doddridge, J., said: "One appoints his servant to sell plate for him, which is in value below the standard, — the standard is 5s. per ounce and the plate is worth only 2s., — and he commands him to sell according to the standard [but he really sells below it]; shall the vendee not have an action on the case?" which was in effect a contrary opinion.

1625. *Shelley v. Burr*, 1 Rolle's Abr. 2, pl. 7. — "Action on the case does not lie against man and wife for negligently keeping their fire in their house by which the house of the plaintiff was burned, for that the action lies upon the general custom of the realm against the paterfamilias and not against a servant or a feme-covert who is in the nature of a servant."

1641. *Noy, Maxims*, c. 44. — "For murder, felony, battery, trespass, borrowing or receiving of money in his master's name by a servant, the master shall not be charged, unless it be done by his command, or come to his use by his assent.

"A man shall not be charged by the contract of his wife or his servant, if the thing come to his use, having no notice of it. But if he command them to buy, he shall be charged, though they came not to his use, or had notice thereof.

"If I command my servant to distrain, and he doth ride on the distress, he shall be punished, not I.

"If a man command his servant to sell a thing that is defective, generally to whom he can sell it, deceit lieth not against him; otherwise if he bid him sell it to such a man it doth."

1668. *Cremer v. Humberton*, 2 Keb. 352. — "The high-sheriff and under-sheriff is one officer; and if one delivers white acre on *habeas facias poss.* of black acre, the high-sheriff is chargeable, but otherwise of a common servant, who is a trespasser, if he take one man's goods as another's for which I sent." [An example of the Particular Command doctrine.]

1677. *Michael v. Alestree*. — Action for bringing ungovernable horses to be trained in Lincoln's Inn Fields, whereby the plaintiff was injured; the horses were actually taken there by a servant of the defendant. The chief discussion was as to the general liability for so using horses. It is then said, in 2 Lev. 172: "It shall be intended that the master sent the

¹ The citation of these authorities, all found *ante*, shows the continuity of doctrine.

servant to train the horses there;" in 3 Keb. 650, "The master is as liable as the servant if he gave order for it."

1685. *Kingston v. Booth*, Skinner, 228. In an action of trespass for assault, battery, and wounding, "these points were ruled by three of the justices. . . . Secondly, If I command my servant to do what is lawful, and he misbehave himself, or do more, I shall not answer for my servant, but my servant for himself, for that it was his own act; otherwise it was in the power of every servant to subject his master to what actions or penalties he pleased. Thirdly, If I command my servant to do a lawful act, as in this case to pull down a little wooden house (wherein the plaintiff was . . .) and bid them take care they hurt not the plaintiff, if in this doing my servants wound the plaintiff, in trespass of assault and wounding brought against me, I may plead not guilty, and give this in evidence, for that I was not guilty of the wounding, and the pulling down the house was a lawful act."

In view of the almost uniform language of Courts, counsel, and text-writers in these records of the sixteenth and seventeenth centuries, it seems necessary to believe that the test, as it came to be accepted in those centuries, was none other than that of Command (*i. e.* before the deed) or Consent (Assent) (*i. e.* before or after the deed). In one specific case it is fairly clear that, for reasons not here important, and not now needing to be set out, the old strict liability continued down through the seventeenth century, viz., the case of a fire started by the servant within the house. But apart from this exceptional case, and possibly one or two others involving the persistence of extraneous traditions, it may be inferred that the Command or Consent test was the natural and universal one. Moreover, it accords perfectly with the notions which we have found to characterize the later Germanic and the early Anglo-Norman periods, being the natural form of their orderly development.

Harmonizing with and corroborating the general rule, are two subsidiary rules, worth noting by way of evidence: (a) The rule that the command of the master excused the servant. It does not necessarily follow, of course, that where the servant had no command to plead in excuse, there the master would *not* be liable (though, as above indicated, that was in fact the rule); but the cases on pleading command in excuse are useful in indicating how common and natural that test was, and in thus corroborating the applicability of the corresponding test in suits against the master.¹

¹ Among the cases in point may be noted (1441) 19 H. VI. 50 pl. 7; (1463) 2 Edw.

(b) The rule of pleading that the replication in denial *de injuria sua propria*, when made in answer to a plea of justification as servant under the command of a master, was proper only where the justification consisted in a command merely, without any claim of interest in property (Crogate's Case).¹ That a master's command, as above in (a), was generally a sufficient excuse is clearly implied in this rule, and we have here a corroborative effect of the same sort.

In the cases in the sixteenth and seventeenth centuries (notably in *Southern v. How*, *Cremer v. Humberton*, *Kingston v. Booth*, also in *Noy and Doctor and Student*, all pointing back to the idea in the 9 H. VI. case) appears the refinement which may be termed the doctrine of Particular Command, *i. e.* the doctrine that the master, to be liable, must have commanded the very act in which the wrong consisted (unless the command had been to do a thing in itself unlawful). It was somewhat by way of a reaction against this refinement that the form of the rule began to change under Lord Holt; and to this next stage we now come.

2.

We may here pause for a moment to consider the situation at this time. It is obvious that the Particular Command doctrine, if pushed to its logical extreme (as it was apparently coming to be), must have resulted in putting very narrow limits on the principle of responsibility for servants' and agents' doings. The doctrine would require, in effect, that the master should be liable (unlawful errands apart) only when the deed in all its details had been expressly and specifically commanded; and the arguments in *Southern v. How*, *supra*, suggest the practical consequences of such a rule. Now, whether or not such a limited rule would have been desirable, it is certain that the circumstances of the time forced upon the judges a serious consideration of the expedencies of such a rule. The nation was reaping in commercial fields the harvest of prosperity sown in the Elizabethan age and destined to show fullest fruition in the age of Anne. The conditions of industry and commerce were growing so complicated, and the original

IV. 5, pl. 10; (1481) 21 Edw. IV. 5 pl. 10; (1678) *Mires v. Solebay*, 2 Mod. 244. This notion began to be repudiated in (1694) *Sands v. Childs*, 2 Lev. 351, and (1701) per Lord Holt, in *Lane v. Cotton*, 12 Mod. 472, 488.

¹ 8 Rep. 66 (1608).

undertaker and employer might now be so far separated from the immediate doer, that the decision of questions of masters' liability must radically affect the conduct of business affairs in a way now for the first time particularly appreciated. A time had come when persons administering the affairs of others could no longer be classed indiscriminately as "servants," at the beck and call of the master for each bit of work, — a time when in social development the position of a factor or agent vested with more or less authority and discretion was in fact no longer that of a servant.¹ It was therefore natural that the judges should find themselves forced to consider (1) the practical expediency of the traditional test of liability, (2) if they should revise it, the expression and presentation of the test as revised. On the first point, it is clear that they

¹ Mr. Justice Holmes has shown (IV. Harv. L. Rev. 361; V. id. 6-9) how the early law knows only "servants," and how the "agent" is a later branching off from this class. The same thing has been additionally shown by Mr. Charles Clafin Allen, in the current *American Law Review* (vol. 28, p. 18). According to Murray's Dictionary, "agent" first appears in the commercial sense in Marlowe and Shakspeare. It may fairly be claimed that Shakspeare has in mind the rule, of his day, when (applying it, to be sure, to a case of moral, not legal, responsibility) he introduces the following colloquy: —

King Henry the Fifth, IV. 1: (One of the soldiers has been expressing forebodings as to the fatal outcome of the morrow's battle) *Williams*: ". . . Now if these men do not die well, it will be a black matter for the king that led them to it. . . ." *King Henry* (in disguise): "So, if a son that is by his father sent about merchandise do sinfully miscarry upon the sea, the imputation of his wickedness, by your rule, should be imposed upon the father that sent him; or if a servant, under his master's command transporting a sum of money, be assailed by robbers, and die in many irreconciled iniquities [that is, meet sudden death without a chance to get absolution for past sins], you may call the business of the master the author of the servant's damnation. But this is not so; the king is not bound to answer the particular endings of his soldiers, the father of his son, nor the master of his servant; for they purpose not their death when they purpose their services." This is fairly an application of the doctrine of Particular Command.

It seems that the laws of Massachusetts Colony indicate a state of society in which the masters were still looked to for servants' torts, even where not commanded, — Brunner's thesis being illustrated, that the liability follows and depends on the power of control and correction.

1646. *Laws and Liberties of Mass.*, 1660. Tit. "Burglary & Theft" (Whitmore's ed. 127). — "[Penalty imposed for robbing orchards and gardens:] And if they be children or servants that shall trespass herein, if their parents or masters will not pay the penalty before exprest, they [the servants] shall bee openly whipped." [Re-enacted in General Laws of 1672, s. v.]

1678. Law of Mass. Co.'s Council, Mar. 28, 1678 [Whitmore's Colonial Laws, 349]. — "[A penalty for shooting off a gun near any house or highway, and the offender to make full satisfaction to injured persons.]" "And where either they be servants or youths under their parents or masters, and shall not be able to make such satisfaction, such parents or masters shall be liable to make full and due satisfaction in all respects."

did in effect revise it. They determined (whether rightly or wrongly need not be here considered) that practical expediency could not put up with the logical consequences of the Particular Command test.¹ As to the second point, the new phrasing, there was much uncertainty for a time, indeed for a century or more; but naturally enough the existing test was laid hold of and modified to suit their needs; and after all it was in itself fairly adapted to answer for the test which they thought just.² The test now became what may be termed the rule of Implied Command from a General Command or Authority. At the same time; amid the general reconsideration, other phrasings of the test were sometimes vouchsafed. "Whoever employs another is answerable;" "acting in the execution of authority;" "acting for the master's benefit;" "being about the master's business," — these appear as tentative expressions in the general effort to re-state on a rational basis. But the old test, in its broader scope, is still dominant in the last half of the new century.

1691. *Boson v. Sandford*, 2 Salk. 440; 3 Mod. 321. — The question was whether the owners of a ship were responsible for goods received by the master and spoiled by his negligence. Holt, C. J.: "The owners are liable in respect of the freight and as employing the master; for whoever employs another is answerable for him, and undertakes for his care to all that make use of him."

1698. *Tuberville v. Stamp*; action for a fire started by the defendant's servant in a field. Skinner, 681: It was argued by the defence that "it does not appear in this case to be done by the command of the master, and then it being out of his house he is not responsible."

Comb. 459. Holt, C. J.: "And though I am not bound by the act of a stranger in any case, yet if my servant doth anything prejudicial to another, it shall bind me, where it may be presumed that he acts by my authority, being about my business."

1 Ld. Raym. 264: Holt, C. J.: "So, in this case, if the defend-

¹ Lord Holt's judgments show this point of view; but the following passage of Lord Hardwicke's (*Boucher v. Lawson*, (1734) *infra*) is perhaps the most pointed brief one: "This case seemed at the trial of very great consequence, as it concerns on the one side . . . the security that persons have in trusting their gold, . . . and on the other side, as it concerned the security of owners of ships that they might not be charged by the default of their masters further than reason requires."

² Not that they fully appreciated the historical perspective and the significance of the situation; but one may gather from all said and done the meaning of events. We are dealing, not merely with the progress of a rule, but also with the development of an idea.

ant's servant kindled the fire in the way of husbandry, and proper for his employment, though he had no express command of his master, yet the master shall be liable . . . ; for it shall be intended that the servant had authority from his master, it being for his master's benefit."

1699. *Middleton v. Fowler*, 1 Salk. 282. — Case against owners of a stage-coach for a trunk taken on by the driver, but lost. Holt, C. J., said that a stage-coachman was not here within the custom of carriers, and adds, as to the receipt of money by the driver, "no master is chargeable with the acts of his servant, but when he acts in execution of the authority given by his master, and then the act of the servant is the act of the master."

1699. *Jones v. Hart*, 2 Salk. 441. — Holt, C. J., allowed recoveries against the master (1) where a pawnbroker's clerk took a pawn and lost it, and the owner demanded it; (2) where A's servant with his cart ran against another cart; (3) where a carter's servant ran over a boy with the cart. "The act of a servant is the act of his master, where he acts by authority of the master." (Holt, 642.)

1709 (?). *Hern v. Nichols*, 1 Salk. 289. — Deceit for cloth of wrong quality; the deceit was in defendant's factor beyond sea. "Holt, C. J., was of opinion that the merchant was answerable for the deceit of his factor, though not *criminaliter*, yet *civiliter*; for seeing somebody must be a loser by the deceit, it is more reasonable that he that employs and puts a trust and confidence in the deceiver should be a loser than a stranger."¹

1722. *Armory v. Delamirie*, 1 Stra. 505. — Where an apprentice converted a jewel handed to him for weighing, "the action well lay against the master, who gives a credit to his apprentice and is answerable for his neglect." (Pratt, C. J.)²

1734-6. *Boucher v. Lawson*, Lee's Hardwicke, 85, 194. — A ship-master took on gold at Portugal, contrary to Portuguese law, and on arrival in London it was missing. Counsel for defendant: "If the servant of a carrier carry goods without the privity of his master, or his receiving a reward for taking them, the master is not chargeable. . . . A master is not

¹ Here may be noted (1704) *Ward v. Evans*, 2 Salk. 442. A servant took a bill on W. instead of cash, in payment. Held, not binding. "The acts of a servant shall not bind the master, unless he acts by authority of his master," "but acquiescence . . . will make the act of the servant the act of the master." Also, "It is more reasonable that he should suffer for the cheats of his servant than strangers and tradesmen." Sir Robert Wayland's Case, per Lord Holt, 3 Salk. 234. In *Lane v. Cotton*, (1701) 1 Salk. 17, 12 Mod. 477, where the postmaster was sued for the loss of a package by a clerk, the case was argued on the effect of a statute and on the peculiar position of a public officer.

² Under very similar circumstances the master was held responsible in *Mead v. Hammond*, 1 Stra. 505 (1722) by Pratt, C. J.; and in *Grammar v. Nixon*, 1 Stra. 653 (1726) by Eyre, C. J., the master was made responsible for a false warranty; no reasons being given in either case.

answerable for the acts of his servant but where he acts in execution of any authority given him by the master. . . . My servant sells false stuff without my commanding it; no action lies against me; otherwise if by my commandment." Counsel for plaintiff: "As to the master's not being liable for his servant but in the exercise of his trade, this is in the master's trade, for it is the trade of the owners of ships to carry goods;" citing Choke's case of the horse-shoer in 11 Edw. IV., *ante*. Hardwicke, C. J., decides for the defendants. ". . . It deserves to be considered whether, if a ship be sent for a particular purpose, and not in the general way of trade, the master can take in goods to charge the owners. . . . For anything that appears in this case, this might be a ship sent to Lisbon for a special purpose, and if so, no one can say that the master, by taking in goods of his own head, could make the owners liable. . . . This is no reason why these cases should be carried any further than they have been already."¹ [Do we not here see a temporary inclination to draw the line at further extension of the revised doctrine?]

1758-65. *Blackstone, Comm.*, I. 429.—"As for those things which a servant may do on behalf of his master, they seem all to proceed upon this principle, that the master is answerable for the act of his servant, if done by his command, either expressly given or implied: *nam qui facit per alium facit per se*. Therefore, if the servant commit a trespass by the command or encouragement of his master, the master shall be guilty of it. If an inn-keeper's servants rob his guests, the master is bound to restitution; for as there is a confidence reposed in him that he will take care to provide honest servants, his negligence is a kind of implied consent to the robbery; *nam qui non prohibet, cum prohibere possit, jubet*. So likewise if the drawer at a tavern sells a man bad wine, whereby his health is injured, he may bring an action against the master; for although the master did not expressly order the servant to sell it to that person in particular, yet his permitting him to draw and sell it at all is impliedly a general command.

"In the same manner, whatever a servant is permitted to do in the usual course of his business, is equivalent to a general command. . . . A wife, a friend, a relation, that use to transact business for a man, are *quoad hoc* his servants; and the principal must answer for their conduct; for the law implies that they act under a general command; and without

¹ In 1733 (Commons Journal, 277; Abbott on Shipping, 12 ed., Pt. IV., c. VII. 2, p. 339), in consequence of the claim made for the plaintiff in *Boucher v. Lawson*, a petition of merchants was presented to the House, setting forth the discouragement to commerce if owners were held liable for goods made away with by masters and mariners "without the knowledge or privity of the owner or owners," and a statute was passed (7 Geo. II. c. 15) exonerating them from being answerable for merchandise "made away with by the master or mariners without the privity of the owners" beyond the value of vessel and freight. This illustrates how the mercantile community noticed the broader scope of the revised rule as now substituted by the Courts for the traditional test of Particular Command (*i. e.* direct privity).

such a doctrine as this no mutual intercourse between man and man could subsist with any tolerable convenience. . . . [As to a servant's negligence], in these cases the damage must be done while he is actually employed in the master's service. . . . [In conclusion] the reason of this is still uniform and the same, — that the wrong done by the servant is looked upon in law as the wrong of the master himself; and it is a standing maxim, that no man shall be allowed to make any advantage of his own wrong."¹

Attention may here be called to —

1. The form and phrasing of the test. From the arguments in *Boucher v. Lawson* and the passages of Blackstone, it may easily be seen how the idea of Express Command was naturally enlarging itself into that of Implied Command, a Command to be implied or posited from a general commission to do a class of acts. "Whatever a servant is permitted to do in the usual course of his business," says Blackstone, "is equivalent to a general command." "Where he acts in execution of any authority," says counsel in *Boucher v. Lawson*; and this is the dominant phrase with Lord Holt. "It may be presumed that he acts by my authority, being about my business," is another phrase of his. The new terms are natural enough and hardly call for explanation. It may be suggested, however, that "authority" was particularly easy of adoption because about this time it seems to have had, as a primary sense, the concrete meaning of a specific order (not merely the power itself, abstractly regarded).² As the full meaning of the situation was realized, it was inevitable that the broader terms "scope of authority," "exercise of trade," "course of employment," should prevail; but this was not yet to be.³

¹ Compare here, also, (1773) *Barker v. Braham*, 3 Wils. 368, — an action allowed against client and attorney for an arrest made by an error of the latter. De Grey, C. J.: "They say, whoever procures, commands, assists, assents, etc., is a trespasser; here the client commands the attorney, the attorney actually commands the sheriff's officer; the real commander is the attorney, the nominal commander is the plaintiff in the action. . . ."

² Cf. *Brandon v. Peacock*, Lee's *Hardwicke*, 86 (1730): "A person put tobacco on a ship, the master ran away with the ship and tobacco, the goods being insured, the person that owned the tobacco applied to the insurance office and received the value of it. The insurance office took *an authority* from him to sue the owner, and the C. J. held that the action lay."

³ One might fancy that the phrase of the St. 27 Ed. III. *ante*, "offended in the office in which his master hath set him," supplies an antecedent for these phrases. But it would seem that "office" was purely a civil or canon (not Roman) law phrase. In Doct. and Stud. (II. c. 42) the civilian, asking for the English law, gives as a part of his

2. The reasons offered for the rule. As already remarked, we find first under Lord Holt an effort to put the rule on a rational footing,¹ — an effort which, owing to inherent difficulties, has not yet by any means ceased. Usually some definite ground of policy, more or less tenable, was offered. Lord Holt's reasons are in substance covered by his brief sentence in *Wayland's Case*, *ante*: "It is more reasonable that he should suffer for the cheats of his servant than strangers and tradesmen," because it is he (*Hern v. Nichols*) who "puts a trust and confidence in the deceiver," and (*Armory v. Delamirie*, per Pratt, C. J.) "gives a credit" to him. Blackstone, tracing the harm back to the original command of the master, says "no man shall be allowed to make any advantage of his own wrong." Lord Hardwicke (*Boucher v. Lawson*) tries to strike a fair balance between the "security" which others ought to have who trust the servant and the "security" which masters ought to have from wayward employees. But very often the judicial mind gave up the troublesome task of accurately expressing a reason, and, quite content with the policy of the rule, took refuge, when it came to naming a reason, in a fiction or other form of words. "The master undertakes for the servant's care," said Lord Holt, in *Boston v. Sandford*; which of course is not true. The favorite expressions of this sort, however, were "the act of the servant is the act of the master," when done in execution of authority (*Middleton v. Fowler*, *Jones v. Hart*, *ante*) and "*qui facit per alium facit per se*" (Blackstone, *ante*; *Laugher v. Pointer*, *post*); and perhaps "*respondeat superior*" has often been used thus to evade giving a clear reason. Now here it must be noticed that there are different ways of employing a fiction. One is to accept as a guide a traditional element which no longer answers to the notions of the day and to insist upon its use; as when the loss and finding are alleged in trover, or the loss of service in seduction.

own test, "when the household offendeth in any office or ministry that the master is the chief officer of;" and the writer has not found the phrase elsewhere than in that book and in the above statute. In the latter it may easily have been inserted by some clerical secretary learned in the canon law.

A test once ventured in 1698 (*Tuberville v. Stamp*, as in 1 Ld. Raym. 264) was that the act should be "for the master's benefit;" and in the present century this phrase has played some part, though generally in subordination to and supplementary to the "scope of employment" test (*Bush v. Steinman*, *infra*; and *passim*).

¹ E. g. in *Beaulieu v. Finglam* (1401), *ante*, the Court harshly refuses to argue the question of expediency.

In the former case the allegation is now recognized as a pure and ineffectual fiction; in the latter, except by a few statutes, the loss of service must still be proved, though the whole basis of the claim rests to-day on other notions. A very different way is to employ a fiction to sanction a rule which we thoroughly believe in, but lazily prefer to evade accounting for openly and rationally. Of this sort is the instance in hand. Sometimes, as where in a document under seal the seal is said to presume a consideration, we borrow some kindred doctrine and force it to our present use; but sometimes, as here, we put forth a phrase not already used for the purpose, but now found very handy. So that what we have to remember about the employment of the above fiction of Identification, in the history of the present doctrine, is, (1) that it was merely a reason, an easy, lazy reason, which was put forth to sanction and support a rule of whose practical expediency the Courts were perfectly satisfied; (2) that it was merely one of several reasons, and by no means the most common, and that, in short, the rule would have stood substantially as it does now, if all reference to the Identification fiction were wanting.¹

3.

In what may be taken as the next stage, the balance is seen to change gradually; the Command test disappears as a regular one, and "scope of employment" and its congeners come into full control. The opinions of Lord Kenyon seem chiefly to mark the change (though his language is not uniform). *Savignac v. Roome* and *Stone v. Cartwright* show the rivalry with particular clearness.

¹ Mr. Justice Holmes, in IV. Harv. L. Rev. 345-364, and V. id. 1-23, believes that the identification fiction plays a leading part in earlier history; but he has apparently been able to find before 1700 only five or six instances, not all unambiguous. The plain one from West's *Symbologie* clearly owes its origin to the civil law (as does a great deal throughout the book). West's "by some bond he is fained to be all one person," is the borrowing of a notion well known across the water: "*Eadem est persona domini et procuratoris. Eadem, inquam, non rei veritate, sed fictione,*" etc. (Dig. 44, 2, 4, note to Elzevir ed.). Very different are the indigenous English expressions, — scarcely fictions, but merely statements of legal results; e. g. "the driving of the servant is the driving of the master" (*Smith v. Shepherd*). Coke says of disseisin (Co. Litt., sects. 430-435): "Where the servant doth all that which he is commanded, . . . there it is as sufficient as if his master did it himselfe, for the rule is, *qui facit, etc.*" This "as if" (and Littleton says the same) shows that there is here no fiction in a proper sense, — merely a concise statement of the legal result. The out-and-out identification expressions do not come into much vogue until after Blackstone's time.

1795. *Morley v. Gaisford*, 2 H. Bl. 442. — Case against one whose servant negligently drove a cart against the plaintiff's chaise. A verdict was found for the plaintiff, but a motion was made in arrest of judgment that the action should have been trespass. "The Court seemed at first inclined to refuse the rule, saying that it was difficult to put a case where the master could be considered a trespasser for an act of his servant, which was not done at his command," but, after delaying for further consideration, the rule was discharged on the defendant's suggestion. [See the argument for the defendant in *Brucker v. Fromont*, 6 T. R. 659 (1796), as showing that this misconception of the earlier form of the rule was already in the air. Note that this, the first judicial misunderstanding of it (which became the basis of a special doctrine noticed later on), was in the Common Pleas, and that the King's Bench, Lord Kenyon's Court, did not exhibit it until well on in the next century.]

1795. *Savignac v. Roome*, 6 T. R. 125. — Case for wilfully driving, by his servant, a coach against the plaintiff's chaise. Verdict for the plaintiff. Espinasse moved in arrest, because, first, "no action could be maintained against the defendant for a wilful act of the servant, accompanied with force, unless done by command of the master," citing *Jones v. Hart*, *supra*; and, second, because the action should have been trespass. Bayley contended that it was enough if the injury was done in the course of employment; but Espinasse quoted Blackstone, *ubi supra*, and Kingston *v. Booth*, *supra*. The court made the rule absolute on the second ground, without noticing the first.

1796. *Stone v. Cartwright*, 6 T. R. 411. — The defendant managed a colliery as guardian; he employed a superintendent for the work, but took no personal concern in it. He was held not liable for a caving of the soil resulting from the improper removal of pillars. Lord Kenyon stated that such actions should be brought against either "the hand committing the injury, or against the owner for whom the act was done." Lawrence, J., said: "If the plaintiffs had given evidence that the defendant had particularly ordered those acts to be done from whence the damage had ensued, that would have varied the case."

1799. *Bush v. Steinman*, 1 B. & P. 404. — The defendant contracted with a surveyor to repair his house; the surveyor contracted with a carpenter; the carpenter employed a bricklayer; and the bricklayer's servant put a pile of lime in the road, by which the plaintiff was injured. Lord Kenyon: "The general proposition that a person shall be answerable for any injury which arises in carrying into execution that which he has employed another to do seems to be too large and loose. The principle of . . . *Littledale v. Lord Landsdale* comes much nearer. . . . The work being carried on for his benefit and on his property, all the persons employed must have been considered as his agents and servants. . . . The responsibility was thrown on the principal from whom the authority

originally moved." Rooke, J.: "He who has work going on for his benefit and on his premises must be civilly answerable for the acts of those whom he employs."

1800. *Ellis v. Turner*, 8 T. R. 531. — Case for goods which the master of the defendant's ship refused to deliver. Lord Kenyon, C. J.: "The maxim applies here *respondet superior*. . . . The defendants are responsible for the acts of their servants in those things that respect his duty under them."

1800. *McManus v. Crickett*, 1 East, 107. — Action for driving a chariot against the plaintiff's chaise. Lord Kenyon, C. J.: "At the trial it appeared in the evidence that one Brown, a servant of the defendant, wilfully drove the chariot against the plaintiff's chaise, but that the defendant was not himself present, nor did he in any manner direct or assent to the act of the servant." Then following Lord Holt's phrase, "in the execution of the authority," and noting three of the earlier authorities on Command, he says: "If a servant quits sight of the object for which he is employed, and without having in view his master's orders, pursues that which his own malice suggests, he no longer acts in pursuance of the authority given him." And the headnote begins: "A master is not liable in trespass for the wilful act of his servant, as by driving his master's carriage against another, done without the direction or assent of the master."

1811. *Paley on Agency*: "But the responsibility of the master for the servant's negligent or unlawful acts is limited to cases properly within the scope of his employment. . . . The responsibility of the principal is confined to acts done either under his express direction, or in his service and therefore under his constructive command. In all cases in which the frauds or injuries of servants have been held to affect their employers, it appears that the employment afforded the means of committing the injury. No wilful trespass of a servant, not arising out of the execution of his master's orders or employment, will make him responsible." [Note "in his service and therefore under his constructive command."]

1812. *Nicholson v. Mounsey*, 15 East, 384. — Case against the captain of a man-of-war for a collision occurring through the negligence of the lieutenant. Lord Ellenborough phrases it that the owner or master "is answerable for those whom he employs, for injuries done by them to others within the scope of their employment."

1826. In the great case of *Laugher v. Pointer*, 5 B. & C. 547, where the defendant had hired a coach from a stable, and the stable-keeper sent a driver with it, and a collision ensued, there is no traceable remnant of the literal form of the doctrine; all seemed ready to say, as Lord Kenyon did: "I admit the principle, that a man is answerable for the conduct of his servants in matters done by them in the exercise of the authority that he has given them."

From this time the general test is phrased as "scope" or "course" of "employment" (*Sleath v. Wilson*, 9 C. & P. 607, 1839; *Story on Agency*, 1839; *Smith on Master and Servant*, 1852), "scope of authority" (*Cornfoot v. Fowke*, 6 M. & W. 358, 1840; *Att'y-Gen. v. Siddon*, 1 Tyrwh. 41, 1830; *Coleman v. Riches*, 16 C. B. 104, 1855), or, in later times, more carefully, "in furtherance of and within the scope of the business with which he was trusted" (*Keating, J.*, in *Bolingbroke v. Board*, L. R. 9 C. P. at 577, 1874). No attempt has been made to note here all the cases from 1800 to 1850.

Did no direct traces remain at later times of the supplanted Command test? Or was its broader substitute left in sole possession of the field after Lord Kenyon's time?

1. A very few cases are to be found in which (the judges perhaps, having been brought up under the earlier form of doctrine) a direct survival may be seen.

1828. *Goodman v. Kennell*, 1 Moore & P. 241. — Case for injuries from a horse ridden by the defendant's servant; the servant was a person casually employed to do an errand, who had without orders taken the defendant's horse to ride on. *Park, J.*: "A master would not, certainly, be liable for an act done by his servant whilst riding the horse of another, without his knowledge, or against his consent. But in the present case the question was, whether or not there was sufficient evidence of an assent or authority, either express or implied, from the defendant to C. to use the horse." *Best, C. J.*: "It has been truly said that a servant's riding the horse of another, without the assent or authority of the master, cannot render the latter answerable for his acts. But here the question was, whether there was not sufficient evidence to show that C. was riding the horse with the defendant's assent, and on his business." [Here we may see a transitional stage, in which "order," "assent," "authority," were for some time used indiscriminately as practical equivalents.]

1857. *Patten v. Rea*, 2 C. B. N. S. 606. — Action for negligently driving a horse and gig against the plaintiff's horse. On a ruling for the plaintiff, a rule *nisi* was asked for misdirection, "first, in not leaving to the jury the question whether the horse and gig driven by W. T. were used by him on his master's business, at the instance and *express* request of the defendant." The jury had found, in answer to the judge's questions, that there was no verbal request, but that T. had gone on the defendant's business, and that "the defendant knew it and assented to it." *Crowder, J.*, the trial judge, said: "The contention was that, in order to render the defendant liable, there must be something tantamount to a command by the master. The rule is not quite correct in the use of the

word *express*." Cockburn, C. J., said, as to this: "[It is met] by the fact that the master was cognizant of the course which his servant was pursuing at the time, and did not dissent." Williams, J., said: "Now it clearly is not necessary in cases of this sort that there should be any *express* request; the jury may imply a request or assent from the general nature of the servant's duty and employment. There was ample evidence of such implied request or assent here."¹

2. By one of those misunderstandings not infrequent in our legal system, the language of the seventeenth century became, in the eighteenth, the basis of the rule that the form of the action against the master could be Trespass in that case alone where the specific act had been commanded by him.

1849. *Sharrod v. R. Co.*, 4 Ex. 581. — Trespass for driving an engine over the plaintiff's sheep; the driver had been directed to go at a certain speed. The defendants objected that the remedy was case. Parke, B.: "The sending the engine along the line was the voluntary act of the Company, and they are responsible for the consequences; but the question is whether they are liable in trespass, they not having given any order for the injurious act. . . . The maxim '*qui facit per alium facit per se*' renders the master liable for all the negligent acts of the servant in the course of his employment. . . . Trespass will not lie against him, . . . unless, as was said by the Court in *Morley v. Gainsford*, 2 H. Bl. 442, the act was done '*by his command*;' that is, unless either the particular act which constitutes the trespass is ordered to be done by the principal, or some act which comprises it, or some act which leads by a physical necessity to the act complained of," citing *Gregory v. Piper*. "This is the simple case of an act done by the servant in the course of his employment, not specifically ordered by the master."²

¹ Even in later cases we may find expressions which, if they are not to be traced to the same source, at least show how easily translatable the older test is to the newer.

"In the course of the service and for the master's benefit, though no express command or privity of the master be proved." Willes, J., for the Court in *Barwick v. Bank*, L. R. 2 Ex. 259 (1867). "It is true he has not authorized the particular act, but he has put the agent in his place to do that class of acts." Quoted with approval by Lord Selborne, in *Houldsworth v. Bank*, 5 App. Cas. 326 (1880).

Most of the American cases came at a time when the text-books had made the "scope of employment" or "authority" phrase the familiar one; but a few are to be found using the old language; e. g. *McCalla v. Wood*, Pennington (N. J.) 86 (1806). "Upon principles of law, one person can never be made liable for the trespass of another. It is true, that if one command or authorize his servant to commit a trespass, he is answerable himself; but then it is the trespass of the master, according to the well-known maxim of the law *qui facit per alium facit per se*."

² This case of *Sharrod v. R. Co.* was preceded in the same year by *Gordon v. Rolt*, 4 Exch. 365, in which much the same question was considered: Rolfe, B.: "To render the master liable in trespass, it must appear that he ordered the servant to do the act, and there is no evidence of that here."

But this rule began in a misconception, gradually evolved, of the earlier rules, and involves the cases *ante*, *Morley v. Gaisford*, *McManus v. Crickett*, *Gregory v. Piper*. The stages were three: (1) *Morley v. Gaisford* (1795), in the Common Pleas, initiates the above rule; but a comparison of it with *Savignac v. Roome*, *ante* (1795), and *Brucker v. Fromont*, 6 T. R. 659 (1796) indicates the prevailing principle, as administered in the King's Bench, to have been that the form of action followed the nature of the act; *i. e.* sue the master in Case where negligence of the servant is the basis of the claim, sue in Trespass for the servant's trespass. (2) In *McManus v. Crickett*, *ante* (1800), Lord Kenyon held that the master is not liable *at all* for a wilful trespass of the servant, unless done at express command, because he thus practically exceeds his authority; for his trespasses not wilful, Case lies. Of this understanding are Paley (*ante*), and Peake (p. 294), writing shortly after. (3) Then forgetfulness ensued, the opinion at the bar altered, and in (1826) *Gregory v. Piper* (9 B. & C. 591) and in (1849) *Sharrod v. R. Co.*, *supra*, it was said that the master is not liable in Trespass for his servant's trespasses (*i. e.* direct acts, wilful or not), unless expressly commanded. This doctrine may well be regarded as a necessary result of the common-law theory of Trespass; but it seems on the evidence that it originally crept in through a misconception of the language of the old Command test, then becoming obsolete.¹

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¹ The small part played historically by the identification fiction has already been pointed out. It seems necessary to suggest, with deference, that this conclusion, if true, makes grave difficulties in the way of accepting the thesis of the learned investigator already mentioned, that the fiction "that within the scope of the agency principal and agent are one" is "the survival from ancient times" of the superstitious patriarchal liability "generalized into the form of a fiction, which, although nothing in the world but a form of words, has reacted upon the law and has tended to carry its anomalies still further," and that the modern rules "depend upon fiction for their present existence." The learned writer therefore concludes that "common-sense is opposed to the fundamental theory of agency." This is not the place to offer to do what no one has yet succeeded in doing, — to phrase the feeling of justice which every man has in the more or less limited responsibility for agent's torts; but it is worth while noting that the Command or Authority principle may prove to be, theoretically as well as historically, the true support of the rule of responsibility for agents' torts. Perhaps the nearest approach to this yet made is that of Lord Brougham, in *Duncan v. Findlater*, 6 Cl. & F. 894, 910: "I am liable for what is done for me and under my orders by the man I employ, . . . and the reason that I am liable is this, that by employing him I set the

whole thing in motion, and what he does, being done for my benefit and under my direction, I am responsible for the consequences of doing it." In other words, (1) if I command A to do act *x*, I ought to be liable for the natural consequences peculiar to that act taken in itself; (2) the same follows if *x* is a class, series, or group of acts; (3) if A does the act in a careless or otherwise wrongful way, different from that in which I expected him to do it, and not as I myself might have done it, my personal culpability is no longer clear; nevertheless, complete legal exoneration in such cases would be poor policy, for it would afford ample opportunity to shirk responsibility, merely by appointing substitutes; so that some medium must be found. If, then, I employ knowingly a careless servant, here at least I should be liable, just as for imprudently keeping a dog known to be ferocious. But even this may on practical grounds be too lenient a rule, for I may still find means of evading due responsibility under cover of that test. Public convenience then may demand that I should be liable up to a still further point, even though I select agents carefully; in other words, we may say that I employ a substitute more or less at my peril. Just as gunpowder is kept at peril, but steam-engines, through demands of industrial welfare, are not kept at peril, so there is an undefined point at which the appointment of a substitute ceases to be at peril; and in the nature of the case that point is in individual instances hard to determine. But the conflict is hardly, as the learned writer would place it, between common-sense and tradition, but between one great consideration of policy and another; and if the restraining consideration just now seems to be the weak one, it is just because, as the above-mentioned article admits, popular opinion is convinced (rightly or wrongly) that the broad rule is a "seemingly wholesome check on the indifference and negligence of great corporations." Whether for the sake of this alone we should sanction such broad limits in dealing with the general mercantile community is perhaps a slightly different question. But at any rate the whole liability, wherever it be bounded, can be discussed and expressed, it would seem, "according to the ordinary canons of legal responsibility."

RE MOTENESS OF CHARITABLE GIFTS.

IN the sixth volume of the HARVARD LAW REVIEW, page 195, my learned friend, Mr. Jabez Fox, has criticised me for saying that the true object of the Rule against Perpetuities is to restrain the creation of future conditional interests, and that it is not aimed directly at preventing the non-alienation of property. Mr. Fox's main purpose, however, is not so much to refute this particular error, as to condemn a method of treating legal subjects of which he finds in me an example.

A writer who employs this method, in considering a case, will neglect the grounds upon which the counsel have placed their arguments and the court its judgment, and will base the decision on reasoning which never occurred to any of the persons who were actually concerned in the case; in short, he will treat the rulings of the court as the utterings of Balaam's ass, absolutely true, but not presupposing any conscious intelligence in the creatures from whom they proceed. Although using my own words, I feel quite sure that I have given Mr. Fox's meaning correctly; and, if I have, I agree with him in his condemnation of such a method.

I will go further, and will add what my learned friend may have had in mind, though he was too civil to express it.

When a student is beginning to read law, and one legal proposition is the same to him as any other, it is essential for an instructor to insist strongly upon the distinction between the *dicta* and the *ratio decidendi* in a case; but there is risk of exaggeration, the distinction may be pushed too far; and I admit frankly that to do so is a temptation in academic instruction to both teacher and student; I am conscious of having yielded to it myself; I have warned others against it; if I have been guilty of it here, I cannot plead ignorance of the danger; if I have sinned, I say Amen to my learned friend's anathema.

But have I sinned in this particular matter? Is the statement criticised an offspring of this justly condemned method of dealing with the authorities?

The rise of many doctrines in our law is unknown or has to be guessed from remote and uncertain sources, and the natural growth of many doctrines has been interrupted by legislation or by

theories and practices borrowed from particular callings. But the Rule against Perpetuities is of comparatively modern origin ; we can trace it from its beginnings ; and its development has been singularly little affected by legislation or by outside influences. It is pre-eminently a common-law doctrine, born and bred in the courts, and in its growth a typical example of the development of the common law. None better can be found. This has always seemed to me to give it a peculiar interest.

What, then, is the normal development of a doctrine in our law ?

Generally, it first emerges in the judicial consciousness in a vague and somewhat formless condition, and when it begins to take shape its limits are now too narrow and now too broad. Gradually, as successive generations of lawyers and judges deal with it, it acquires a defined outline ; sometimes it is broadened so as to cover cases not within its first expression, sometimes it is narrowed so as to exclude cases which, though within its terms as first laid down, are not within its principles as finally developed. But when a legal doctrine is in its early stage, statements are often made and theories often advanced by judges which are, and necessarily must be, vague and not in entire harmony with the form which the doctrine finally takes ; and yet it is a common phenomenon for these early statements and theories to survive and be repeated, even when the law has been settled in a manner really inconsistent with them ; and such survival leads not infrequently to decisions which cannot be reconciled with what have been established and are acknowledged as true principles. Nor is this strange. To have constantly in the mind such a complete conception of a doctrine, as to feel at once the discordance of every proposition not entirely in harmony with it, is a rare gift in any one, be he a judge or not.

Instances might be multiplied *ad libitum*.

What is the true ground of prescription at the present day ? It is analogy to the statute of limitation. Yet courts were formerly in the habit of sustaining it on what later judges have called " the revolting fiction " of a lost grant, and the obviously wrong decision that a subsequently occurring disability suspends the running of prescription was logically enough based upon this fiction in *Lamb v. Crosland*,¹ as late as 1850.

So, in case after case, the doctrine that " the general intent must

¹ 4 Rich. 536.

overrule the particular intent" was announced as the true principle underlying the application of the rule in Shelley's case; and, even after the luminous expositions of Lord Redesdale and Lord Wensleydale and Chief Justice Cockburn, when one might have hoped that it had been rooted out of the law, we find it still invoked in 1884 to sustain a very doubtful decision in *Bowen v. Lewis*.¹

Again: "The transfer of personal chattels is governed by the law of the domicile of the owner." How often has this been said by judges of the greatest eminence. Yet it is not true of transfers *inter vivos* of particular chattels. It would be hard to find a decision to that effect. And at last some text-writers are plucking up courage to say so.

I will not multiply instances: the learned reader can think of them for himself; indeed, a great part of the history of the law might be written by the consideration of such cases.

How, then, should a writer deal with a topic in the law which has passed through a history like this? Certainly, he should not form an *a priori* theory of how the law *ought* to have developed; but if he finds that the law *has* developed in a particular way, he should not be deterred from saying so because judges in the older time have not been gifted with piercing prophetic vision, and have used expressions which cannot be made to square with the matured doctrine of to-day, nor even because those *dicta* of earlier courts are to be found in the mouths of modern judges.

When, as in the case of the Rule against Perpetuities, all the late developments of the law cannot be reconciled, it is not always easy to determine which represent legitimate lines of growth, and which are bastards, to be recognized only as exceptions. I suspect these latter will often be found to have had their origin in some inaccurate *dictum* of an early court.

Of course, I do not suppose that I have been able always successfully to distinguish the true doctrine, but the method which I have followed has been to study the decisions which have actually been made, and to try to determine which seem to bear the notes of legitimacy; I have not, consciously at least, employed the method which Mr. Fox condemns, viz., the substitution of one's *a priori* conceptions for the decisions of the courts.

To come to the specific difference between Mr. Fox and myself; it can best be stated in a concrete form.

¹ 9 Ap. Cas. 890.

On the application of the Rule against Perpetuities there are, in modern times, two sets of decisions which cannot be reconciled.

First. It is held that if land be given to A and his heirs, with an option of purchase at any time by B and his heirs, the gift to B is too remote and therefore bad.

Second. It is held that if land be given to X Charity until some contingency, which may be remote, happens, and then to Y Charity, the gift to Y Charity is good.

In favor of the validity of the gift to B it is urged that B's interest is alienable at any time; to which the answer made is that such fact is immaterial, for B's interest is dependent on a remote contingency.

Against the validity of the gift to Y Charity it is urged that it is dependent on a remote contingency, to which the answer made is that such fact is immaterial, for the interest of neither X nor Y is alienable.

That is, the first class of cases puts as the test of invalidity the remoteness or nearness of the contingency on which the gift is to take effect, while the second puts as such test the restraint or non-restraint of an interest which is legally alienable. The first class of cases says the rule does not apply to vested interests. The second class says the rule does not apply to inalienable interests.

One of these views represents the true theory, and the other is an exception. Or, in Mr. Fox's words, one is a "misfit." Now which is the misfit? Mr. Fox believes it to be the first. I believe it to be the second.

My learned friend thinks I am wrong because many judges have said that the object of the Rule against Perpetuities is to prevent property from being made inalienable.

The facts seem to be these:—

The judges, from the earliest times, have been opposed to perpetuities. I do not know that any one has thoroughly investigated the cause, but the fact, I suppose, is undeniable.

A perpetuity could arise in two ways, *first*, by taking from the owner the power to alienate property; *secondly*, by allowing interests to be created *in futuro*. In the beginning these ideas were confounded; gradually they were differentiated; the *first* gave rise to the Rule forbidding restraints on alienation, the *second* to the Rule against Perpetuities.

When this differentiation occurred, it was inevitable that a fur-

ther question should arise. Is the second rule merely a form of the first? Is a remote future interest objectionable only because for too long a period there may be no one who can give a good title; or is it objectionable also because the policy of the law does not allow interests so uncertain in value to hamper a present ownership? Under many circumstances, whichever principle was applied the judgment would be the same; but, finally, cases arose which required a decision of this question, and in them it was held that the second rule was more than merely a form of the first, and that interests, although alienable, might yet be bad for remoteness; or, in other words, that the validity or non-validity of an interest did not depend solely on whether the alienability of the property was affected, but on whether the interest was upon a remote condition.

This was involved in the decision of a case in England as early as 1764, *Grey v. Montague*,¹ and in the United States, in *Brattle Square Church v. Grant*,² in 1855.

It is not strange that remarks can be found, made by early judges and repeated by later ones, to the effect that the Rule against Perpetuities is intended to prevent restraints against alienation, for that is true, although the later course of decision to which I have referred shows that it is not an exact statement of the whole truth. Such a state of things one would naturally expect; it is entirely in accordance with the physiology, if I may use the word, of the common law.

It is true that in *Avern v. Lloyd*,³ Vice-Chancellor Stuart held an interest subject to a remote condition to be good because it was alienable, saying: "It seems obvious that such a case is not within the principle on which the law against perpetuity rests;" and that in *Birmingham Canal Co. v. Cartwright*,⁴ Fry, J., held that an option to buy on a remote contingency was good. He said: "I think that wherever a right or interest is presently vested in A and his heirs, although the right may not arise until the happening of some contingency which may not take effect within the period defined by the Rule against Perpetuities, such right or interest is not obnoxious to that rule, and for this reason. The rule is aimed at preventing the suspension of the power of dealing with property, — the alienation of land or other property. But, when there is a present right of that sort, although its exercise may be dependent

¹ 2 Eden, 305; s. c. 3 B. P. C. (Toml. ed.) 314.

² 3 Gray, 142.

³ L. R. 5 Eq. 383 (1868).

⁴ 11 Ch. D. 421 (1879).

upon a future contingency, and the right is vested in an ascertained person or persons, that person or persons, concurring with the person who is subject to the right, can make a perfectly good title to the property."

These cases certainly support Mr. Fox's view; but in *London & S. W. R. R. Co. v. Gomm*,¹ the Court of Appeal expressly overruled *Birmingham Canal Co. v. Cartwright*, and held that an option to buy on a remote contingency was bad; and the case of *Avern v. Lloyd*, which, in common with all text writers I had ventured to doubt, has, since I wrote, been overruled in terms by the Court of Appeal, in *Re Hargreaves*.²

This, surely, is a striking illustration of the phenomenon to which I have called attention. Here we have two judges, exceptionally able judges, misled by the incomplete form in which former courts had declared a doctrine, and, in consequence, making decisions which had to be overruled.

Again Mr. Fox quotes from the opinion of the Supreme Court of Massachusetts in *Odell v. Odell*.³ "The reason of the rule is that to allow a contingent estate to vest at a more remote period would tend to create a perpetuity by making the estate inalienable;" (Mr. Fox stops here, but the passage continues thus) "for the title of the first taker would not be perfect, and until the happening of the contingency it could not be ascertained who was entitled, and the estate could not be alienated, even, as has been said, if all mankind should join in the conveyance."⁴

But about a year ago, the same court said: "It has sometimes been suggested as a reason for the Rule against Perpetuities, that it is impossible for the owners of the estate to convey it, and that the estate is rendered inalienable, 'though all mankind should join in the conveyance.'⁵ This statement is not accurate in reference to many estates which come within the rule. The mere fact that a contingent interest may be released by persons in being, and that a good title may thus be made, is not enough to take the case out of the rule, if the estate cannot be alienated by those having vested interests in it, because a possible future interest is created which may not vest within the time fixed by law."⁶ A careful examina-

¹ 20 Ch. Div. 562 (1882).

³ 10 All. 1, 5.

² 43 Ch. Div. 401 (1889).

⁴ *Brattle Square Church v. Grant*, 3 Gray, 142.

⁵ *Brattle Square Church v. Grant*, 3 Gray, 142, 152.

⁶ *Gray on Perpetuities*, 275, 329, 330; *London & Southwestern Railway v. Gomm*, 20 Ch. D. 562.

tion of the cases will show that this has always been the law in Massachusetts. . . . This appears also in the leading case of *Brattle Square Church v. Grant*,¹ in which a single ambiguous or inaccurate expression has sometimes led to a misunderstanding of the law intended to be quoted. . . . Undoubtedly the fact that the holders of vested interests cannot convey tends to make the property practically inalienable, for oftentimes the holders of contingent interests are unknown or cannot be found, and if they are accessible, it is not easy to obtain releases of contingent rights on which it is impossible to fix a value. But the possibility of obtaining releases is not the test by which to determine the validity or invalidity of a limitation."²

I hope my learned readers will agree that I have cleared my skirts of the charge of substituting my own vain imaginings for the matured doctrines of the reverend sages of the law.

The case which Mr. Fox considers to set forth the true doctrine is *Christ's Hospital v. Grainger*,³ in which Lord Cottenham held that a limitation over from one charity to another was good without regard to its remoteness. He said: "It was then argued that it was void as contrary to the Rules against Perpetuities. These rules are to prevent, in the cases to which they apply, property from being inalienable beyond certain periods. Is this effect produced, and are these rules invaded by the transfer, in a certain event, of property from one charity to another?" And he thought not. His remarks on the subject occupy less than a dozen lines.

I cannot reconcile the principle of this case with the principle of *London & S. W. R. R. Co. v. Gomm*, of *Re Hargreaves*, and of *Winsor v. Mills*. Mr. Fox does not attempt to reconcile them. He would call the latter cases misfits. I am not aware that any one has reconciled them.

Cessante ratione, cessat ipsa lex, may be a sound maxim, but there is sometimes more than one reason for a rule. Lord Cottenham's error was, I humbly conceive, this: He saw that *a* reason for applying the Rule against Perpetuities did not exist in that case, and he assumed too hastily that the rule had no other reason.

Either the English Court of Appeal and the Supreme Court of Massachusetts are wrong in extending the operation of the Rule against Perpetuities beyond those cases where some question of

¹ 3 Gray, 142.

² *Winsor v. Mills*, 157 Mass. 362, 365, 366.

³ 1 McN. & G. 460 (1849).

alienability is involved, or Lord Cottenham was wrong in confining it to those cases.

I will not repeat what I have said elsewhere on this question, but a case has been lately decided which shows in a surprising, and indeed startling manner, that there was rather a sin of omission on the part of Lord Cottenham, than a sin of commission on the part of the other courts. Indeed it is this case which has led me to write these few pages. If I had conceived of the ingenious structure which a clever conveyancer has since raised on Lord Cottenham's opinion, I should have had a stronger argument against the correctness of that opinion than any that I employed. A better illustration of the danger of throwing over a principle because its application to the facts is not immediately obvious, has seldom occurred.

In *Re Tyler*¹ A gave £42,000 to the London Missionary Society, and committed to their keeping the keys of his family vault, the same to be kept in good repair; "failing to comply with this request, the money left to go to the Blue Coat School." The Court of Appeal felt bound by *Christ's Hospital v. Grainger*, which had stood for over forty years, and as a necessary consequence, they held the condition good. A gift over from one charity to another had been decided not to be too remote; and, so long as it was not charged on any particular fund, there was nothing illegal in repairing a tomb.

Yet see to what this leads; A gives \$200,000 to Harvard College, on condition that, on the first day of January in each year, it pays \$5,000 to the then heir of the body of A, and if it fails to do so, then the fund to go to Yale College. The gift over to Yale College is, according to *Christ's Hospital v. Grainger*, and *In re Tyler*, perfectly good; and so long as not charged on any particular fund, there is nothing illegal in paying \$5,000 to the heir of the body of A on the first day of every January. But is not such an arrangement against public policy? Which is the sounder view of the Rule against Perpetuities? That which condemns, or that which sanctions such a scheme?

Let no one say that such a scheme is fanciful. On the contrary, there is a Church not a thousand miles from Cambridge which holds a fund now amounting to not far from \$200,000, under a trust to pay half the income upon demand to the person

¹ [1891] 3 Ch. 252.

who is for the time being heir of the body of the founder, and the founder subsequently directed that on failure to do this, the fund should go to another Church in the neighborhood. The fund was established before the decision in *Re Tyler*, and indeed before *Christ's Hospital v. Grainger* was decided; the founder appears to have been his own conveyancer, and I suppose that on the deeds of foundation, as actually drawn, the gift to the heir of the body of the founder for the time being is bad on any theory, but how easily could the founder, had he known it, have adopted the device used in *Re Tyler*. When that device is generally known, many a rich man will seek an assurance of perpetual wealth for his descendants by attaching such a conditional limitation to a charitable gift.

I wrote of *Christ's Hospital v. Grainger*, that the "decision has stood so long unquestioned that it is likely to be followed;" but the dangerous possibilities disclosed by *Re Tyler* make this perhaps more doubtful.

To believe two contradictory propositions at the same time is common enough, but is no part of the duty of a legal writer. If he finds two doctrines which apparently disagree, he should seek to reconcile them. If he cannot do this himself, and if he can find no one to do it for him, he must choose between them.

If both are established, he must determine which represents the main principle, and which the anomaly, the exception, and to do this he should look at the past and at the future, at history and at consequences.

I do not disguise from myself the difficulty of the task. Whether, as to the matter in question, I have found a real disagreement or only a mare's nest, and whether, if there be two different irreconcilable views, I have chosen the right one, I leave to the judgment of the candid reader.

I sincerely approve of my learned friend Mr. Fox's general criticism; that I do not think his illustration a happy one, is perhaps natural enough. To applaud a sermon, but to believe that one's neighbors need it rather than one's self, is nothing new.

I had thought of adding a word upon Mr. Fox's strictures of Judge Holmes's articles, but have forborne for the good reason that I do not know enough about the subject discussed.

John Chipman Gray.

AN EARLY CONSTITUTIONAL CASE IN
MASSACHUSETTS.

IN the appendix to Bancroft's History of the Constitution of the United States (Vol. II., p. 472), he gives an extract from a letter of J. B. Cutting to Thomas Jefferson, then abroad, dated July 11, 1788, mentioning what appears to be the earliest instance in Massachusetts of judicially declaring a law unconstitutional. "I have also enclosed," says Cutting, ". . . the manly proceeding of a Virginia Court of Appeals. Without knowing the particular merits of the cause, I may venture to applaud the integrity of judges who thus fulfil their oaths and their duties. I am proud of such characters. They exalt themselves and their country, while they maintain the principles of the Constitution of Virginia and manifest the unspotted probity of its judiciary department. I hope you will not think me too local or statically envious when I mention that a similar instance has occurred in Massachusetts, where, when the Legislature unintentionally trespassed upon a barrier of the Constitution, the judges of the Supreme Court solemnly determined that the particular statute was unconstitutional. In the very next session there was a formal and unanimous repeal of the law, which, perhaps, was unnecessary."

This passage has excited much interest, and inquiries have been made whether it might not be possible by searching contemporary newspapers, or examining the early statutes and resolves, to get some clue that would guide in exploring our judicial records. A letter recently written by Mr. A. C. Goodell, Jr., the learned editor of the Acts and Resolves of the Province of Massachusetts Bay, throws some light upon the matter. It is so instructive a contribution to the subject that we avail ourselves of the permission of the writer and of his correspondent to print the greater part of the letter.

Mr. Goodell, after stating that when he received his friend's application he had memoranda of four cases only which, in resemblance, seemed to approach Mr. Cutting's description, but that neither of these appeared to tally with it exactly. He promised to look over his lists of repealed and repealing acts between 1780 and

1788, to see if there might not be a case more nearly answering the description. He also offered the use of his lists of Acts to aid in a further examination of the court records, should an exhaustive search be thought desirable. He gave the names of the parties in the first two of the cases referred to as *Brattle, Admr. v. Hinckley et al.*, and *The Same v. Putnam et al.* (Supreme Judicial Court, Worcester, Sept. term, 1786), and added that further study and comparison of the Acts and Resolves prior to 1788 rather confirmed him in the opinion that although the circumstances did not wholly agree with those stated by Cutting, the judgment in these cases, or one of them, was the foundation of Cutting's statement.¹ He then proceeded as follows :—

"The cases I have first mentioned were actions of debt, originally brought in the Inferior Court of Common Pleas for Worcester County, on bonds executed by the defendants to William Brattle, the plaintiff's intestate (and father), in 1770 and 1771, respectively. The writs bear date Aug. 15, 1785, and the pleadings were substantially the same in both cases. After oyer and setting forth the condition, the defendant, without denying the original obligation, pleaded, in bar, that the intestate, being an inhabitant of Boston, on the 20th of April, 1776, joined with the fleet and army of the King of Great Britain, then warring with the Colonies, and became an absentee, and remained ever after, until his death, within the dominions of and a subject of said king; and that, therefore, the court, in rendering judgment, ought not to compute interest upon the sum mentioned in the bond, between April 19, 1775, and Jan. 20, 1783, in conformity to the Resolve of Nov. 10, 1784,² which had been revived and continued by the Resolve of Feb. 7, 1785,³ and which provided that in such suits brought by absentees, judgment for all interest accruing between the dates aforesaid, that is, during the war, should be suspended until further action of the Legislature.

"To this the plaintiff demurred, and judgment was awarded to the defendant. The plaintiff appealed to the S. J. C. at the next term at Worcester, when he waived his demurrer, and, by way of replication, pleaded *precludi non*, for that William Brattle, the intestate, died at Halifax, Oct. 16, 1776, 'and that his estate descended and vested to [*sic*] Thomas Brattle [the plaintiff], and to Katharine Wendell, his children and heirs, who, at the time of commencing this action, were, and ever since have been, citizens of this Commonwealth, and not aliens nor absentees.'

¹ Other early cases in which the legality of the action of local authorities was contested before the same court were carefully re-examined, but did not appear to turn upon a conflict with the Constitution.

² Acts and Resolves, (new ed.) 1784, Chap. LXXVII., p. 300.

³ *Ibid.* Chap. XXXVIII., p. 338.

"The appellees (the original defendants) demurred, and, upon issue joined, judgment was recorded as follows:—

"'And after a full hearing of said parties upon said pleas the Court are of opinion that the appellees' plea is insufficient to bar the appellant of the interest during the war; it is therefore considered,' etc.—The actions were brought by John Sprague, Esq., and, for the defendants, Caleb Strong appeared in the former case, and Dwight Foster in the latter.

"The Resolves which the judgment of the court here seems impliedly to have set aside, you observe, hardly came up to Cutting's description, which is of a 'particular statute.' It was this variance that induced me to make further search before referring you to these cases.

"I have said that further examination, in the light of Cutting's letter, confirmed my former surmise. This is chiefly because of the relation of the decision and the repealing Act in point of time; but also because of Cutting's allusion to the 'Constitution.' The only written constitution existing at the time Cutting evidently refers to was that of the Commonwealth; but I cannot recall a case at that early period in which our Legislature had followed the direction, or intimation, rather, of the S. J. C. by repealing, 'in the very next session,' a statute because it conflicted with the fundamental law of the State. I do not believe any such case would have escaped me, since the subject is one which, formerly, I pursued with great care and vigilance; and I feel confident that I could not have forgotten such a case had it ever come to my knowledge. There was, however, another application of the word 'Constitution' then much in vogue, and particularly in reference to the subject of legislation covered by these Resolves. This was the treaty obligations entered into with Great Britain, by the General Congress.

"As early as May, 1783, that far-seeing statesman, Alexander Hamilton, as chairman of a committee appointed to take into consideration and report to Congress what further steps are proper to be taken by them for carrying into effect the stipulations of the Provisional Treaty of Peace with Great Britain, signed at Paris, Nov. 30, 1782, reported a Resolve that 'the several States be required, and they are hereby required,' to remove all obstructions which may interpose in the way of the entire and faithful execution of the 4th and 6th articles of that treaty. By a ye and nay vote this report was referred to a committee, and the subject seems not to have come up again until March 21, 1787, when, upon the report of the Secretary for Foreign Affairs concerning certain correspondence between John Adams, Minister Plenipotentiary to Great Britain, and His British Majesty's Secretary of State, the Congress unanimously passed the well-known resolutions in which they declared, *first*, that the Legislatures of the several States cannot of right pass any Acts for construing, limiting, or impeding the operation of any national treaty; *second*, that all such Acts repugnant to any such treaty ought to be forthwith re-

pealed; and *third*, that it be recommended to the several States to make such repeal rather by describing than by reciting the objectionable Acts, and by declaring their repeal in general terms; and that 'the courts of law and equity,' in all causes cognizable by them wherein such Acts are by their terms operative, shall decide according to the true intent and meaning of the treaty, said Acts to the contrary notwithstanding.

"The passage of these resolutions was followed by the issue of a circular letter to all the States, embodying the resolutions and fully declaring and explaining the principles involved. This letter was approved by a vote of Congress, April 13, 1787, and on the 30th of the same month the Legislature of Massachusetts passed an Act in the very words therein prescribed and recommended to the several Legislatures for adoption. This Act of the General Court, though scarcely 'a formal repeal of the law,' was an effectual repeal of the Resolves of 1784 and 1785, which were passed, professedly, in evasion of the 4th article of the provisional treaty with Great Britain; but the decision of the court in Brattle's cases had preceded the passage of this repealing Act of the State Legislature by more than four months, albeit it is true that that Act was passed, as Cutting says, 'at the very next session,'—it being a special session called by proclamation to elect a successor to Thomas Ivers, State Treasurer, who had died since the last prorogation.

"Cutting's mention of the 'Constitution' may be thus explained: In the circular letter above mentioned occur such passages as the following:—

"*'Our national Constitution* having committed to us [Congress] the management of the national concerns with foreign states and powers, it is our duty to take care that all the rights which they ought to enjoy within our jurisdiction by the laws of nations and the faith of treaties remain inviolable.'

"*'When, therefore, a treaty is constitutionally made, ratified, and published by us, it immediately becomes binding on the whole nation, and superadded to the laws of the land, without the intervention of State Legislatures.'*

"*'— By repealing in general terms all acts and clauses repugnant to the treaty the business will be turned over to its proper department, viz., the judicial, and the courts of law will find no difficulty in deciding whether any particular act or clause is, or is not, contrary to the treaty. Besides, when it is considered that the judges in general are men of character and learning, and feel as well as know the obligations of office and the value of reputation, there is no reason to doubt that their conduct and judgments relative to those as well as all other judicial matters will be wise and upright.'*¹

¹ Thus this masterly statement anticipated the doctrine laid down in United States

"The precise significance of the decisions in these cases, however, is not apparent on the record, and is rendered still more doubtful by a directly opposite decision at the same term, upon an issue raised by pleadings which fail to show clearly that they differed essentially from Brattle's in the ground of the action or in the nature of the defence. This was an action (likewise of debt, and in which the pleas were similar) brought by the Rev. Dr. Henry Caner, of London, previously rector of King's Chapel, Boston, against Houghton, *et al.*, to recover the principal and interest on a bond given to him by the defendants before the Revolution. Although Caner, unlike Brattle, was among those who were formally expatriated by the Act of 1778-79, chap. 24,¹ he was not excluded from the favor accorded to British creditors by the 4th article of the treaty. The Act for confiscating the goods and estates of absentees² applied with equal force to both Caner and Brattle. Nor did the decease of Brattle operate to the advantage of his legal representatives, since the Act of March 2, 1781,³ applied expressly to 'absentees who have died while under the King of Great Britain,' as well as to 'absentees now living.' If it may be shown or is conceivable that Brattle's children remained here while he was in exile, and it be therefore inferred that the court construed the laws so as to exempt them from the consequences of the confiscation of their parent's estate, that inference is against the rule then recognized, and more recently solemnly declared by the judiciary, that confiscation of personal property operated by force of the act, *ipso facto*;⁴ and, moreover, by analogy to the rule followed in other similar categories, it must be assumed that the special relief afforded to the kindred of absentees by § 10 of the Act 1778-79, chap. 49, was a full equivalent of their claims and a substitute for any other form of recognition thereof, legal or equitable. Moreover, if Brattle's administrator relied upon a state of facts justifying a decision the reverse of that given in Caner's case, he certainly did not plead it in his replication, which fails to negative the possibility of the children's having shared their father's exile, and of their continued residence in the king's dominions, as his subjects, through the whole period of the war and until after the treaty of peace.

"Upon the whole, the supposition which seems to me most reasonable is that after the decision in Caner's case, the court, upon further argument and advisement, took the broad ground that they were constitutionally bound; *i. e.*, by the supreme law, as declared by Congress, to disregard the State resolves in conflict with the 4th article of the treaty, and to overrule their former decision, and to award to Brattle's administrator

2. The Schooner *Peggy*, 1 Cranch, 103; *Ware v. Hylton*, 3 Dall. 199; *Lessee of Gordon v. Kerr*, 1 Wash. C. C. Rep. 322; *Livingston v. Van Ingen*, Paine's C. C. R. 55, etc.

¹ Province Laws, vol. v. p. 912.

² 1778-79, chap. 49, *Ibid.*, p. 968.

³ 1780, chap. 50, Acts and Resolves of Mass. (new ed.), 1780-81, p. 115.

⁴ 4 Dane's Abr. 705.

full interest upon his claims from the date of the original obligations to the date of the judgments.

"This decision was in effect, though not expressly, ratified by the Legislature in the Act of April 30, 1787, — an Act which, we may well agree with Cutting, was 'unnecessary,' especially in view of the declaration of Congress in their circular letter.

"The other earlier cases which I have alluded to as exemplifying the authority of the court to defeat proceedings under a State law which in their judgment conflicts with treaty obligations, or with some principle of international law, were decided by the S. J. C. at the February term in Suffolk, 1782. I confess I have very little confidence that either of these earlier cases can have been intended by Cutting; for, although judgment, which was entered up Feb. 19, 1782, was followed by a repealing Act passed on the 5th of July,¹ — the 'next session' — the clause repealed seems to have no relation whatever to the point decided, and could not have been connected with it except through misapprehension, since it was first contained in an Act passed after the cases were decided.²

"Briefly, these suits were brought originally in the Common Pleas in Suffolk; one, against George de France, and the other, against Benet Merlino de St. Pry, by James Thomson, a collector of taxes, to recover taxes assessed to them in the town of Boston under several tax Acts in 1779 and 1780.

"The actions were authorized by chapter 18 of the Acts of 1763-64,³ an Act passed to enable Samuel Adams to unload the burden of his tax-warrants.⁴ Prior to this Act, which was limited in its operation to the town of Boston, collectors were confined to the regular remedy by distress; but by the new statute they had, in certain exigencies, an additional remedy by an action at law. All the conditions requisite for resorting to the new remedy existed in this case, and since, by the tax Acts, the taxes for the State, county, and town were ordered to be assessed upon all the 'inhabitants,' which word, by the same Acts, was defined to mean, 'all male persons from sixteen years old and upwards residing or usually doing business' in the town, the plaintiff declared, in debt, that, in each case, the defendant, 'during the whole of said year [1780] and ever since, hath been an inhabitant of said town of Boston, and ratable to the State, county, and town taxes, and was, by the assessors of said town, duly rated,' etc., — setting forth the several assessments, the demand, etc., in due form. The pleas were alike in both cases.

"Perez Morton, for the defendant, de France, appeared and pleaded *nil debet*, whereupon William Tudor, for the plaintiff, demurred, 'reserving

¹ Acts of 1782, chap. 17.

² Acts of 1781, chap. 28, passed March 5, 1782.

³ Province Laws, vol. iv. p. 668.

⁴ See note to the Act of 1769-70, chap. 3, in Province Laws, vol. v. pp. 55-57; also my paper on Adams's Difficulty, in Mass. Hist. Coll. vol. xx. p. 213 *et seq.*

liberty of waiving' the demurrer in the S. J. C., and consenting to any new issue by the defendant. Upon issue joined on this demurrer, the court overruled it and awarded judgment for the defendant, and the plaintiff appealed.

"In the S. J. C. the original defendants, waiving the former issue, pleaded, respectively, that they were born in the city of Bordeaux, in the kingdom of France, under the allegiance of the French king, and each further alleged that he 'hath, from the time of his birth to this day, been and remained a subject of the said king, and hath continued under allegiance to said king of France, and, therefore, is not and cannot be subjected to any taxes, imposition, or duties, other than those which respect real property, by the orders, laws, or directions of the supreme power of any of the United States of America,' — all which he is ready to verify, etc., and prays judgment, etc.

"To this plea first, Tudor, and later, John Lowell, for the appellant, the original plaintiff, demurred. A similar demurrer was made in the action against St. Pry. Both demurrers were overruled, and the defendant's pleas sustained and judgment for costs awarded them.

"I am not a little puzzled in endeavoring to satisfy myself upon what supposed obligation the court based these adjudications. I have not discovered any foundation for them in the treaties between France and the United States, except the reciprocity promised to France for its surrender of the *droit d'aubaine* in the treaty of amity and commerce of 1778; nor do I know of any principle of international law at any time recognized which might be supposed to require such an exemption as the defendants claimed. Yet it appears that, simply on the ground that a French resident of Boston had not renounced fealty to his sovereign, he was held by our Supreme Court to be exempt from taxation of his poll and personal estate.

"It is true that on the fifth of May, 1780, the Legislature of Massachusetts had ratified and formally enacted the provisions of the 13th article of the first treaty of Paris, which had been ratified by Congress two years before;¹ but this was about five months after the enactment of one of the tax Acts under which the collector acted, and some two months after the rates of the defendants had been actually determined, and the warrants therefor given to the collector. If, therefore, the court felt constrained to defer to the provisions of the treaty, it could hardly have been because of the enactment of those provisions by the Legislature so long after the plaintiff's right as a public agent had accrued. It must have been, I think, that the court considered the treaty itself the supreme law operating *proprio vigore* without the intermediate sanction of the State. Yet, even in this view, a still greater difficulty is encountered in endeavoring to discover the incompatibility of the system of taxation here and

¹ Prov. Laws, 1779-80, chap. 47, and note thereto, in vol. V., p. 1370.

the treaty. I find it impossible to detect any such analogy between our public taxes and the continental right of *aubaine* (which was a sequestration to the Crown, by prerogative, of the goods of a deceased alien), as would carry the obligation, under our pledge of reciprocity, to exempt from public taxes French citizens resident here. I am forced to conclude that these decisions of the court were a supererogatory manifestation of good faith or good-will towards our Gallic friend and ally; and the likelihood that such a manifestation would be so agreeable to a friend of Mr. Jefferson as to lead him to mention it in his correspondence is the main reason for my calling your attention to it.

"In any event we must conclude that the treaty, somehow, was the consideration which turned the scales of justice, and that the judges had no doubt of their authority to disregard any statute of the State in conflict therewith. This is one of the earliest, if not the very earliest, of instances of the exercise of a new function conferred upon the judiciary by the Constitution of the Commonwealth, in its separation of the judicial, legislative, and executive powers. Before this great constitutional change the judicial courts had no authority to defeat the expressed will of the Legislature, save, perhaps, in those cases of infringement of the natural laws of morality and liberty which the old lawyers were fond of instancing, but which were generally believed so unlikely to occur as to be practically insupposable.

"I had occasion to discuss this pre-constitutional subordination of the judiciary in some remarks I made at the meeting in May last of the Massachusetts Historical Society,¹ upon Judge Samuel Sewall's refusal of the writ of *habeas corpus* to a prisoner committed by authority of a special Act of the Legislature. The views I advanced were rather earnestly questioned at that meeting. But since then Mr. Senator Hoar, who took part in the debate, has called my attention to a speech by Roger Sherman reprinted in Paul Ford's recent publication of contemporary essays on the Constitution, in which the same opinion is expressed. In a more recent letter, the Senator frankly says: 'I have no doubt [of the correctness of] your statement as to the unlimited power of our Legislature before the Constitution, subject always, as you limit it, to the royal prerogative.'²

"However incongruous it may have seemed to the sceptical at the period of the adoption of our State Constitution, and however absurd it may yet appear to the lawyers of Europe, that a tribunal which owes its establishment to, and may be abolished by, the Legislature, should have the power

¹ Proceedings Mass. Hist. Soc., May, 1893, p. 231.

² The absolute supremacy of the Legislature during the Revolution—that is, after formal renunciation of allegiance to the British crown, and before the adoption of the Constitution of the Commonwealth—is recognized by the Supreme Judicial Court in *Kilham v. Ward et al.*, 2 Mass. 240, and by Sedgwick, J., in another case there reported in the margin (*Gardner v. Ward, Jr., et als.*, *ibid.*, p. 251).

to defeat the Acts of that Legislature, we have practically experienced no difficulty in the operation of the system. Everybody understands that a judge is bound to take notice of the superior obligations of national treaties, and of Acts of Congress within their sphere, as well as of the words of the written Constitutions of his State and nation. In the exercise of his function of applying and enforcing the will of the Legislature, the judge is as much bound to see that the Act is within the scope of legislative authority as he is to apply reasonable rules of interpretation. He has no power to repeal, to be sure, but in the particular case before him he may practically relieve either party; yet, notwithstanding his decision, the law remains intact, to be repealed or insisted upon by the Legislature, or perhaps to be sustained by the same judge on more careful consideration, or confirmed by the preponderance of judicial opinion.

"These last paragraphs are hardly responsive to your letter, but were prompted by the recollection of your recent pamphlet upon judicial powers. I am strongly inclined to the liberal theory of judicial authority. I believe that danger is less to be apprehended from the judges' *defeating* legislation, than from their *making law*. As interpreters of the fundamental law to which they and the Legislature are alike subject, their authority to declare a legislative incongruity is implied in their vocation; and the power and the duty are commensurate. But their province is to *discover*, not to *invent*. They are absolutely forbidden to *make* law by the constitutional provision for the exercise of this function by a totally separate and distinct department, and by the express prohibition of interference by the three coördinate branches of government.

"To return for a moment to Brattle's cases. At the time Cutting wrote to Jefferson, the word 'Constitution,' as we have seen, applied to the national treaties simply because they were a part of the fruits of the new and predominant sovereignty inseparable from a union to which, however imperfect, the several States had united in relinquishing their right to deal as independent political communities with each other and with foreign nations.

"This was followed by the gradual relinquishment of some of their internal autonomy; and where the relinquishment was final, it went to make up the new and national 'Constitution;' which had thus a twofold aspect: first, as the legitimate arbiter and dictator of foreign affairs; and second, as the exclusive controller of certain domestic concerns, the management of which it was evident could be safely and to best advantage entrusted to the general government. This paved the way for a new and more perfect frame of government, to which the old name of *The Constitution* was not only *given*, but by which the name was *assumed*.

"During the colonial and provincial period the same word was used here and in England to designate the political system, and also certain rights and privileges which were claimed to be the natural inheritance of Englishmen; and as you are aware, some striking parallels may be

pointed out in the use of the word in its different senses at widely separated periods.

"While, therefore, I would not positively affirm that the case which Mr. Cutting had in mind was not one in which the court pronounced a law void because contrary to the organic law of the Commonwealth, I should not, on the other hand, conclude that he *did* refer to such a case simply because he declared that, in a certain statute passed before July, 1788, 'the Legislature unintentionally trespassed upon a barrier of the Constitution.' I only say that I am not aware of any such decision implying or declaring an infringement of the State Constitution; and what I have given above lends some support to the surmise that the solemn determination of the court of which he writes was against an Act in conflict with our national obligations."

A. C. Goodell, Jr.

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JUDICIAL LEGISLATION. — *Trustees v. Jennings*, 18 S. E. (S. C.) 257, is a curious case. In *Trustees v. McCully*, 11 Rich. Law, 424 (1858), the South Carolina court held that evidence of adverse possession of land for twenty years would justify the jury in presuming a good title by lost deed; and this in the face of a statute of 1805, which perpetually exempted the land in question from the operation of the statute of limitations. The court in 1858 therefore practically re-enacted the statute which the Legislature in 1805 had specifically repealed. In the principal case, the right to disregard the presumption, left to the jury by *Trustees v. McCully*, is finally denied, and it is substantially held that the only facts admissible to rebut the presumption are those which would go to disprove adverse possession. The last distinction is gone between the statute of limitations, repealed by the Legislature, and the presumption enacted in its place by the court. "Although the statute . . . could not be pleaded in bar," say the latter, "yet . . . the Legislature did not interdict the defence of the presumption."

RIGHT TO PRIVACY AGAIN. — *Marks v. Jaffa* (N. Y. Law Jour., Jan. 6, 1894), like other cases of its kind, furnishes in the action of the defendant most satisfactory evidence of the justice of the rule of law which gives men "the right to be let alone." The defendant, editor of a newspaper called "Der Wachter," started to publish portraits of the plaintiff, once an actor, now a law student, and of an actor called "Mogulesko," and invited his readers to give by vote their opinions as to which of the two was the more popular. Now it is a perversion of the law of truth in libel to say that it applies to such a case. It is not a case of libel but of invasion of privacy, of unwarrantable and impertinent disregard for the feelings of a person who has in no way offered himself for such criticism. McAdam, J., granted the injunction applied for, saying that the plaintiff's right was "too clear . . . to require further discussion." It is pleasant

for the REVIEW to notice that, as in other cases on the subject, the reasoning of Messrs. Warren and Brandeis' article (4 Har. Law Rev. 193) is adopted by the court.

ANNUAL REPORT OF THE ATTORNEY-GENERAL OF MASSACHUSETTS. — The Attorney-General of Massachusetts in his Annual Report for 1893 comments interestingly upon the increasing proportion of statutes held unconstitutional, pointing out that more have been declared void in the last four years than in the first seventy of the Commonwealth's existence. He also makes several suggestions for the relief of the courts, the most important of which seems to be his proposal that questions of law in trials for misdemeanors should be taken to the Supreme Court only upon report by a judge, and not as now, upon the exceptions of the party, which are often, if not always, either frivolous, or intended solely for delay. He suggests also, that the sessions of the full bench of the Supreme Court be consolidated, and no longer held, as now, in every county in the State. The Massachusetts Supreme Court is, among those of the more important States, almost the last which leads such a perambulatory existence.

Until 1872, all capital trials in Massachusetts were held at the bar of the Supreme Court, then, until 1891, before at least two judges of that court. The result of this has been, according to the Attorney-General, that during the period up to 1891, no capital conviction was reversed. In the year covered by this report, however, two cases of great interest to the profession have shown that no such fortunate results are to be expected from the present system. In one the exclusion of a bit of evidence which subsequently proved immaterial, furnished ground for a new trial, which resulted in an acquittal, based upon substantially the same evidence upon which the previous jury had given a verdict of guilty. In the second, the well-known Borden case, the acquittal has been the subject of adverse comment in the profession (27 Am. L. Rev. 819) because of the exclusion of testimony, which does not appear clearly inadmissible; an exclusion, the propriety of which cannot, under the present law, be tested above, and which has not that final nature which a decision would have if made by members of the Supreme Court.

PARTNERSHIP — DISTINCT PERSONALITY. — To the argument of counsel in *In re Beauchamp Bros.* [1894], Q. B. 1, that a partnership is an entity having an existence separate from that of the individual members, Lord Justice Kay makes pithy reply: "It is no such thing, and the rules do not mean anything of the kind." The learned Lord Justice is true to the traditions of the English common law. The doctrine so emphatically reasserted is a favorite one. It may be worth while to place alongside this forcible utterance the language of one certainly no less worthy of respect than the distinguished Lord Justice. Said Sir George Jessell, in *Pooley v. Driver*, 5 Ch. Div. 458, "Everybody knows that partnership is a sort of agency, but a very peculiar one. You cannot grasp the notion of agency properly speaking unless you grasp the notion of the firm as a separate entity from the existence of the partners; a notion which was well grasped by the old Roman lawyers, and which was partly understood in the courts of equity before it was part of the whole law of the land as

it is now." But it must be sorrowfully admitted that this is almost a solitary statement in the English reports. It is impossible, say the courts, for a partnership to be anything but a joint enterprise, notwithstanding the actual course of business to the contrary. The effrontery of the commercial world in suggesting its own conception of a partnership never fails to draw forth their indignation. It speaks well for the hardihood of merchants that they have continued to carry on business with this understanding in defiance of the judicial edict that a partnership shall not be allowed to be an entity. Yet, in spite of this declamation on the part of the judges, there are some doctrines which, if one may venture to insinuate such a thing, can be explained on no other theory than the one here repudiated. Indeed, this very case assumes that an infant cannot withdraw from the firm creditors what capital he has embarked in a partnership. Why he, like an ordinary joint debtor, cannot defend on the ground of infancy, is a puzzle which the court deciding this case does not solve. We have here the spectacle so often presented of a decision based on the assumption that a partnership is an entity, coupled with the uncompromising *dictum* in the memorable and tremendous words of Betsey Prig, "I don't believe there's no sich a person."

A CASE UNDER THE RULE AGAINST PERPETUITIES. — The Rule against Perpetuities may be said to be founded on two grounds of legal policy; the one, the general objection to restraints on alienation; the other, the necessity that the estate should vest within the prescribed periods. The second grew out of the first, but that it is recognized as perfectly distinct from it appears from the case of *In re Hargreaves*, 43 Ch. Div. 401, where the estate was alienable within the period, but yet held bad for remoteness.

Now this rule, being an arbitrary creation of the law, should be completely within the control of the maxim *Cessante ratione, cessat ipsa lex*; and therefore the recent decision of the English Court of Chancery in *Goodier v. Edmunds*, 3 Ch. Div. (1893) 455 (Stirling, J.), seems questionable, although mentioned with approval by Chitty, J., in the same court. *In re Daveron*, 3 Ch. Div. (1893) 421. There was a gift in trust for sale, which was not limited to take place within the proper period. The members of the class for whose benefit it was given were, however, ascertainable within that period, and the fixed amount of their shares was also ascertainable. They could, therefore, call for an immediate conveyance, so that the estate was neither inalienable nor too remote, being destructible within the prescribed period. The court seems to base its objection on the theory that the use would shift from the beneficiaries of the trust to a purchaser at a period too remote, but the objection is scarcely satisfactory. It was never made an objection to a conditional limitation after an estate tail that the use shifted, and yet such is actually the case. The reason given is that the tenant in tail, by suffering a recovery, might at any time defeat the limitation, and therefore there is no greater tendency to a perpetuity than in an ordinary remainder expectant upon the regular determination of the estate tail. This reason, which is admittedly valid, would seem to find equal application in the case of the power or trust for sale.

This view seems to be supported by *Crocker v. Old South Society*, 106 Mass. 489, and *Seamans v. Gibbs*, 132 Mass. 239.

LUMLEY v. GYE IN THE SUPREME COURT. — The case of *Angle v. St. P. M. & O. Ry. Co.* (14 S. C. Rep. 240), recently decided in the Supreme Court, possesses much interest from several points of view. The complex facts, admitted on demurrer, are perhaps fairly reducible to the following skeleton. The Omaha Company and the Portage Company were rival railroad corporations. In 1882 the Portage Company was in possession of lands granted it by the State of Wisconsin to aid in the construction of its road. This grant was liable to forfeiture upon non-compliance with certain conditions as to the rate of building. Work was being rapidly pushed forward on the Portage Company's line by the railway contractor, Angle, plaintiff in this suit. Everything pointed to the success of the Portage Company in living up to the conditions of the legislative grant, when the Omaha Company wrongfully inter-meddled in its affairs, and by bribery and corruption obtained the control of all its stock from its dishonest officers. The Omaha Company then caused the work of construction on the Portage Company's line to be discontinued, and the plaintiff to be discharged unpaid. Further it induced the Legislature to revoke and forfeit the grant to the Portage Company, and bestow the lands upon itself. The plaintiff Angle recovered a judgment of some \$200,000 against the Portage Company on his broken contract, but found no assets. He thereupon filed this bill to reach the land grant in the hands of the Omaha Company. The demurrer of the latter was sustained in the Circuit Court by Mr. Justice Harlan, who now dissents from the opinion of the majority, for the reasons given at circuit (39 Fed. Rep. 412).

Mr. Justice Brewer, in an opinion full of interesting suggestion, upholds the right of the plaintiff upon two grounds. *First*, he adopts the principle of *Lumley v. Gye*, 2 E. & B. 216, and declares that an action lies by the plaintiff directly against the Omaha Company. How this legal right attaches to the land in the latter's hands he does not demonstrate. *Secondly*, Mr. Justice Brewer points out that the Omaha Company, having obtained the land in the prosecution of a scheme of fraud against the Portage Company, holds as constructive trustee for the latter. Angle's right from this point of view appears to be that upon which an ordinary creditor's bill is founded. The stress of the defendant's contention was that the action of the Legislature was final, and therefore that the Omaha Company took the land freed from all obligations. The court admits the premise but not the conclusion of this argument. The Portage Company lost its land because the Omaha Company wrongfully and intentionally brought about such a situation of affairs that the Legislature thought it best for the public interest to take away the lands from the weaker and bestow them upon the stronger company. The public interest demanded, first of all, the speedy completion of the road. This end might be attained by an Act of the Legislature passing the title of the land from one company to the other, and leaving all private claims between them to be settled by the judiciary. And it is not to be presumed without strong evidence that the Legislature meant to constitute itself a judge of private rights, even if it constitutionally had the power to do so. Granting the further contention of the defendant's counsel that the Portage Company was already in default when the Act was passed, it is not probable that the Legislature would have passed the Act but for the situation which the Omaha Company had wrongfully created. The wrong-doer shall not be heard to say that the Legislature might have forfeited the grant at any

rate. *Benton v. Pratt*, 2 Wend. 385; *Rice v. Manley*, 66 N. Y. 82. Whatever land, therefore, the Omaha Company obtained through the agency of the Legislature as a result of its wrong-doing is held in constructive trust for the Portage Company and its creditors. This decision "neither impeaches the validity of the action of the Legislature, nor casts any imputation upon its knowledge or motives." It is a little difficult to follow the application of *Lumley v. Gye* to this part of the case. The Legislature was under no contract to the Portage Company, the benefit of which was frustrated by the Omaha's Company's wrongful intermeddling. The land already belonged to the Portage Company, though its title was perhaps defeasible.

In the other branch of the case the authority of *Lumley v. Gye* is, however, unequivocally recognized, although the citation of that case must be regarded rather as illustrative than essential to the decision. It is, moreover, to be borne in mind that the difficulties attending the definition of a "malicious interference" or "an act which in law and in fact is a wrongful act" (the phrase of Brett, L. J., in *Bowen v. Hall*, 6 L. R. 6 Q. B. D. 333, quoted with approval by Mr. Justice Brewer) do not arise on the facts admitted by demurrer. The action of the Omaha Company which caused the breach of the Portage Company's contract with Angle was fraudulent, not merely "malicious," or "without lawful excuse." Cases like *Walker v. Cronin*, 107 Mass. 555, also cited by the court, raise far-reaching questions which are not here involved. It is also worth noticing that the distinction between contracts for personal services and contracts for labor or the sale of goods, still occasionally insisted upon, is not mentioned by Mr. Justice Brewer.

TITLE BY ESTOPPEL. — The doctrine of *White v. Patten*, 24 Pick. 324, — that title afterwards acquired by the grantor passes by estoppel to the grantee under a warranty deed not only as against the grantor but also as against one holding by descent or grant from him after acquiring the new title, — has been upheld and extended in the recently reported case of *Ayer v. Philadelphia & Boston Face Brick Co.*, 159 Mass. 84. Though scarcely inconsistent with the previous attitude of the court, its conclusion illustrates how arbitrary the American doctrine is.

The case arose on a writ of entry to foreclose a mortgage. One Waterman made a first mortgage in 1872, and another, subject to the first, in 1874. The first was foreclosed in 1876, and the following year the land was reconveyed to Waterman. Then the holder of the second mortgage conveyed to a third person, and the latter to the demandant. The tenant was a grantee without notice under Waterman. In 1876 Waterman was adjudged a bankrupt and received his discharge. The demandant claimed that, by virtue of a covenant of warranty in the second mortgage deed, the legal title to the land when afterwards acquired by Waterman passed at once to the demandant by estoppel. The second mortgage purported to convey only an equity of redemption, while the covenant had been previously held (157 Mass. 57), in a case between the same parties, to be more extensive than the grant. In *White v. Patten* the grant was coextensive with the covenant. The same rule was applied in both cases; the reason for its application here being that if a different one were laid down it would only "introduce further technicality into an artificial doctrine." Holmes, J., speaking for the court, said: "The estoppel is determined by the scope of the conventional asser-

tion. . . . But the scope of the conventional assertion is determined by the scope of the warranty which contains it. Usually the warranty is of what is granted, and therefore the scope of it is determined by the scope of the description. But this is not necessarily so; and when the warranty says that the grantor is to be taken as assuring you that he owns and will defend you in the unencumbered fee, it does not matter that by the same deed he avows the assertion not to be the fact." Thus an unusual significance is attached to a covenant of warranty, quite aside from the intention of the parties as disclosed by a fair interpretation of the deed.

There are two grounds upon which estoppel has generally been placed: (1), that the covenant is an assertion which the covenantor cannot contradict, — estoppel in the strict sense; and (2), to avoid circuity of action.

The doctrine of estoppel by representation rests upon the ground that "a man shall not be permitted to allege a fact to be different from what he has expressly asserted it to be in his own deed" (143 Mass. 232). What then has the grantor asserted? what has he purported to convey? The representations in the warranty are merely implied and must be construed with the rest of the instrument to ascertain the intention of the parties. If it may be inferred from the warranty that the fee was to pass, this is distinctly negated by the recitals that all the grantor had and all he purported to convey was an equity of redemption. The truth plainly appeared on the face of the deed. How then can it be said that the grantor is estopped from setting up the first mortgage when he has asserted in his deed that his title was subject to it? It seems impossible to rest the estoppel on any representation. In those cases that have held that an estoppel exists although the contract in the covenant is barred, the decision has been based on the assertions in the deed, but in all of them the grant has been coextensive with the covenant (18 How. 82; 10 Ala. 504, 510; 80 Va. 355).

The other ground upon which the doctrine of estoppel is usually placed, namely, to avoid circuity or multiplicity of actions, is founded on the personal promise to indemnify contained in the covenant. But "if the grantee were not entitled to recover the value of the land on the grantor's covenant of warranty, then in such a case, it is obvious that this species of estoppel would not be applicable" (13 Pick. 116, 119). The discharge in bankruptcy precludes it here. Thus both of the above reasons for raising an estoppel fail.

The covenant cannot operate as a feudal warranty, — by way of rebutter, for it is well settled that a feudal warranty so operated only when it had an estate to support it, and it was always commensurate with the estate conveyed. Shep. Touch. 201; Co. Lit. 386 a; 10 Co. 96. If the true ground of the decision is to be found in the statement that the estoppel is a "technical effect of a technical representation," it is not very satisfactory.

The theory that the legal title passes inexorably by operation of law arose when legal remedies were employed to supply the want of equitable jurisdiction. The equitable origin of the fiction is now forgotten, and the rule is applied not only as against the grantor but also as against a purchaser without notice. The court explains its position by saying in reference to the rule of *White v. Patten*: "It is urged for the tenant that this rule should not be extended. But if it is a bad rule, that is no reason for making a bad exception to it." Such a view of the case is certainly open to question. Rawle, Covenants for Title, § 259 *et seq.*

DURING the Christmas recess the School met with an irreparable loss in the death of its assistant-librarian, George Albert Arnold. Mr. Arnold entered the service of the School in September, 1872, at the age of twenty-two, and remained in that service continuously until his death,—a period of more than twenty-one years.

During all that time he was a model of faithfulness and devotion, of disinterestedness, willingness, amiability, patience, and good temper. Though never strong, he was almost never absent from his post. Though he never imposed his own duties upon others, yet he never complained that the duties of others were imposed upon him. Whenever there was anything to be done which he could do, he never raised the question whether it belonged to some one else rather than to him to do it. He will be greatly missed at Austin Hall, as well by the students as by the officers of the School.

C. C. L.

RECENT CASES.

AGENCY—EMPLOYERS' LIABILITY ACT.—One of defendant's employees was killed by an accident due to a defect in the condition of a track, owned and maintained by one W., on which defendant was running a train. *Held*, that this was not a defect in the "ways" under the St. 1887, c. 270, § 2. *Engel v. N. Y., P. & B. R. Co.*, 35 N. E. Rep. 546 (Mass.). Knowlton, J., dissenting.

The majority seem clearly correct. The court cite *Trask v. O. C. R. R.*, 156 Mass. 298, where it was held that the defendant was not liable for the condition of a track which was not under its control; that decision is conclusive of the case before the court.

BANKRUPTCY—COLLATERAL SECURITY—DISTRIBUTION OF ASSETS.—Where a creditor, having a claim secured by collateral against the insolvent estate of a deceased person, filed and proved his claim in the probate court for the full amount, and afterwards realized from his security less than the amount of his claim, he is entitled to a dividend upon the whole amount, and not merely to one upon the difference between his claim as proved and the sum realized from his security. *Furness v. Union Bank*, 35 N. E. Rep. 624 (Ill.).

The decision seems sound. As a party having a joint and several obligation can prove in bankruptcy against both the joint and separate estates for the full amount of his claim, when the bankruptcy proceedings are simultaneous (*In the matter of Peter Farnum*, 6 Boston L. R. 21), so here the creditor should be given the reward of his diligence, and be allowed to prove in full against the insolvent estate, and then realize on his security. Of course he would not be allowed to retain more than the amount of his debt. The case carries out the principle set forth in an earlier Illinois decision: *In Re Bates*, 118 Ill. 524.

BILLS AND NOTES—COLLATERAL AGREEMENT—INNOCENT PURCHASER.—A promissory note was given with collateral agreement that if the consideration was not performed, the note should not be paid. *Held*, that the note could be enforced against the maker by a transferee who had notice of the agreement, though the payee afterwards failed to perform the consideration. *Jennings v. Todd*, 24 S. W. Rep. 148 (Mo.).

There is very little authority on this point, but it seems difficult to support the case on principle. The court seem to overlook the distinction between this case and one in which there is merely an executory consideration without any collateral agreement. The general rule is that a contemporaneous collateral agreement binds the immediate parties and all others who have notice thereof. If the transferee had notice of the agreement, as is admitted in this case, it is difficult to see how he can be in any better situation than his transferor.

BILLS AND NOTES—NEGOTIABLE BONDS—DELIVERY—BONA FIDE PURCHASERS.—A village corporation signed and sealed certain negotiable bonds, payable to bearer, but, instead of delivering them, directed that they should be destroyed, and,

believing that this had been done, issued another set of bonds at a different rate of interest in their place. The bonds were not in fact destroyed, but were stolen from the custody of the corporation, and came into the hands of the plaintiff, who, as a *bona fide* purchaser for value, brings this action to recover interest upon them. *Held*, that the plaintiff may not recover. Negotiable bonds stand upon the same footing with bills of exchange and promissory notes, and cannot become operative without being issued, *i. e.*, delivered as evidence of a subsisting debt. Without such delivery they have no legal inception, and are without value in the hands of a *bona fide* purchaser for value even if the negligence of the defendant corporation made the stealing possible. *Germania Savings Bank v. Village of Suspension Bridge*, 26 N. Y. Sup. 98.

The rule adopted by this decision in its exact scope is well settled, namely, that a delivery by the obligor is under all circumstances necessary to make a bond operative, and that the innocent purchaser for value incurs the risk that this has not been complied with. This follows from the nature of bonds as specialties, and in so far as it applies to bills and notes, those instruments are treated as specialties. The case must be carefully distinguished from that of a transfer where the bond has had already its legal inception by delivery, for it is well settled that a *bona fide* purchaser for value, in such a case, acquires a good title although the bonds were stolen from their true owner, by the vendor. *Leavitt v. Dabney*, 7 Robt. (N. Y.) 350; *Carpenter v. Rommell*, 5 Phila. (Pa.) 34; *Spooner v. Holmes*, 102 Mass. 503. But see *contra*, *Kimball v. Billings*, 55 Me. 147.

CONFLICT OF LAWS—ATTACHMENT BY CREDITORS OF DEBTOR WHO HAS ASSIGNED UNDER FOREIGN STATUTE. — A foreign statute provides that a debtor who makes a voluntary assignment for the benefit of his creditors may, on compliance with the statute, be discharged from his debts; that creditors participating in the proceedings shall be bound by a discharge granted by the court; and that non-participating creditors shall be debarred from receiving anything out of the assigned estate unless a surplus remains. *Held*, that the statute is coercive, and assignments made in compliance with it are ineffectual to pass to the assignee title to *choses in action* or other chattels in New York, to the prejudice of subsequent attachments by creditors of the assignor. *Barth v. Backus*, 35 N. E. Rep. 425 (N. Y.).

The court in carrying out in this case the principle of not giving effect to coercive statutes of another State has really gone further than in the cases where it has refused to regard assignments under the ordinary bankruptcy and insolvency statutes of other States; for in the case of an assignment under an ordinary bankruptcy or insolvency statute the title to the debtor's property passes from him to the assignee by virtue of an order of court made under the statute, and in disregarding such assignments the court is directly disregarding the force of a foreign statute, while in an assignment in compliance with the statute in question here the title passes to the assignee by the direct act of the debtor, and in disregarding the assignment the court disregards a transfer by an individual, and only indirectly defeats the foreign statute. The court holds that as a general rule it will recognize a transfer of title by the act of a non-resident; but if the court had recognized this assignment so far as to allow that title passed to the assignee, it could not, in conformity with its previous decisions, have allowed the attachment (see *Thurber v. Blanck*, 50 N. Y. 80), and it would then be difficult for it to prevent the distribution of the property in accordance with the foreign statute.

CONFLICT OF LAWS—CHARITABLE BEQUEST. — A, domiciled in Peru, bequeathed personal property to establish a charitable institution in New York which his executors and a board of trustees selected by the Surrogate of New York were to manage. The will was proved in Peru, ancillary executors were appointed in New York, and the trustees were selected in conformity to the will. Upon application to the Legislature they were incorporated as "The Sevilla Home" with full power to receive and manage the bequest. Under the law of Peru the executors would hold the funds till the trustees were appointed, who would then have the beneficial right which would previously be in abeyance. According to the New York law the bequest would have been invalid, as there was no trustee at the testator's death to receive the bequest. "The Sevilla Home" prayed that the ancillary executors pay over the funds in their hands. *Held*, that the court would enforce the will and order the fund to be paid over. (1) By comity, a bequest of personalty will be allowed to operate according to the *lex domicilii* where, as here, it is not against public policy. (2) The court is not taking property from one claimant and giving it to another, since by the law of Peru it was held by the executors awaiting distribution and had not vested in a legatee or in the next of kin. (3) If these considerations are insufficient, the action of the Legislature sufficed to make the bequest good. As the beneficial interest in the property had by the law of Peru vested in no

one, the Legislature could accept the gift and provide for its administration in the manner designated by the will. *Dammert v. Osborn*, 35 N. E. Rep. 407 (N. Y.).

The case is perfectly sound. The difference between the effect of a statute passed subsequently to the testator's death, in the case of this foreign will and in case of a New York will, is interesting. A statute where the will was a domestic one would be in derogation of vested rights if it had provided that "The Sevilla Home" should take the bequest, for under the common law it would be depriving the next of kin or some legatee of a beneficial right of property. But under the Peru law, where the beneficial interest awaited ascertainment, the statute was operative.

CONSTITUTIONAL LAW — "LIBERTY" — LICENSES. — Statute provided that persons engaged in hiring laborers in certain counties in the State to be employed beyond the limits of the State must pay a license of \$1000. *Held*, that this Act was unconstitutional. It could not be supported as an exercise of the taxing power because it did not apply to all counties of the State. It could not be supported as an exercise of the police power because it was so far "restrictive or prohibitory" of a trade not "inherently dangerous or harmful to the public," as to deprive citizens of their "liberty." *State v. Moore*, 18 S. E. Rep. 324 (N. C.).

This adds still another to the rapidly increasing number of opinions of the State courts which declare that "liberty" in our constitutions means freedom to pursue any calling. The objections to this interpretation have been fully stated in prior numbers of the HARVARD LAW REVIEW. 4 Har. Law Rev. 365; 7 ib. 300. We submit that, according to the true interpretation of the term "liberty," such a statute as this cannot be set aside on the sole ground that its effect is to seriously restrict or even to prohibit a given trade.

CONSTITUTIONAL LAW — POLICE POWER. — Laws 1889, c. 515, § 4, forbidding the sale of vinegar containing any artificial coloring matter, is not in conflict with the clause of Amendment XIV. of the United States Constitution, which provides that no person shall be deprived of "life, liberty, or property without due process of law." *People v. Girard*, 26 N. Y. Supp. 272 (Supreme Ct.).

This is an interesting case to compare with *People v. Marx*, 99 N. Y. 377, where it was held that a statute prohibiting the sale of all substitutes for butter was unconstitutional, because (to quote the language of Martin, J., in the principal case) "the prohibition was not limited to unwholesome substances." It would seem that the principle of that case required a similar decision in this, yet the court cite it as an authority for a contrary result. The court cite *Powell v. Pennsylvania*, 127 U. S. 678, as if it were entirely in accord with *People v. Marx*, yet in that case a similar statute was held constitutional. On the whole, the case seems not very well considered, and should not be given very great weight if the question were again to reach the highest courts of New York.

CONSTITUTIONAL LAW — POLICE POWER — FREEDOM OF SPEECH. — A statute made it unlawful to use profane language on the lands of the Henrietta Cotton Mills. *Held*, the statute was constitutional though applied to language not amounting to a nuisance, and was a valid exercise of the police power though limited in its operation to one locality. *State v. Warren*, 18 S. E. Rep. 498 (N. C.).

The decision seems a perfectly sound one. So long as such legislation is not arbitrary, the expediency of it is a matter for the Legislature to decide.

CONSTITUTIONAL LAW — POLICE POWER — REVOCATION OF LOTTERY FRANCHISE. — Statute revoked a previous grant of the right to hold a lottery and did not provide for any compensation. It was urged that this violated Section 10 of Article 1. of the Constitution of the United States, which forbids the States to pass laws impairing the obligation of contracts, and the court was confronted with decisions of its own to that effect. *Held*, that the court, despite its previous decisions, was now bound by *Stone v. Mississippi*, 101 U. S. 814, which held that statutes revoking lottery grants were constitutional. *Com. v. Douglas*, 24 S. W. 233 (Ky.).

Cases where State courts have in deference to the decisions of the Supreme Court of the United States overruled their previous decisions upholding the constitutionality of State laws are not uncommon; but cases like the one here noted where the State court has overruled its decisions impeaching the constitutionality of the State laws are more rare. The decision of a State court against the constitutionality of a State statute is not subject to review on error by the Supreme Court of the United States, so the State court is not under the same restraint to follow Supreme Court decisions affirming the constitutionality of State statutes that it is under to follow decisions impeaching the constitutionality of State laws; but it is obvious that the propriety of adopting the construction given by the Supreme Court to the Constitution is the same in both sets of cases.

CONTRACTS — PAYMENT OF DEBT. — By an instrument purporting to be a policy of insurance, the defendants guaranteed to the plaintiff payment of a sum of money deposited by her in a bank in Australia, if the bank should make default in paying the same. The bank made default. Subsequently the bank made an arrangement with its creditors by which it was to be wound up and a new bank constituted, the creditors becoming entitled to certain rights against the new bank in satisfaction of their debts; the plaintiff did not assent to this scheme, but it was binding upon her by the colonial statute. *Held* (affirming the judgment of the Queen's Bench Division), that the defendants remained liable to the plaintiff. *Dane v. The Mortgage Insurance Corporation*, [1894] 1 Q. B. 54.

Lord Esher, with whom concurred Lopes, L. J., thought that the contract was one of insurance against a certain event and that the defendants were liable on the happening of that event. Kay, L. J., said it was immaterial whether the contract were considered as a contract of suretyship or a contract of insurance, as in either case the defendants would be bound to pay, and would thereupon become subrogated to the plaintiff's rights. Apparently it would make no difference in the construction of such a contract, which view is adopted.

CONTRACTS — REFUSAL TO ACCEPT PERFORMANCE. — Plaintiffs and defendant made a contract for manufacture of shears, defendant to furnish the principal materials, plaintiffs to add to them a few minor parts and the labor necessary for their manufacture. The shears were not made according to sample; but the defect was not apparent, so that defendant did not discover it when part of the lot was delivered to him nor until the balance was ready for delivery. He refused to accept any more, but kept those already delivered to him without offering to return them. Plaintiffs now sue on the contract for work and labor. *Held*, plaintiffs cannot recover, as they have never performed on their part. The title remained in the defendant during the entire transaction, and he gained title to the materials added by plaintiffs by accession. Consequently, it is not the case of delivery by a vendor to a vendee "on trial" where after a reasonable time the vendee cannot set up the defects. *Mack v. Snell*, 35 N. E. 493 (N. Y.).

O'Brien and Maynard, JJ., dissent on the ground that "a warranty or agreement on the part of plaintiffs that the manufactured article would be like the sample does not survive acceptance." In other words, they say there is nothing in the distinction of the majority as given above. It seems that the distinction is sound nevertheless. In case of a sale this doctrine is laid down that there must be an objection within a reasonable time or not at all — to protect the vendor; in case of the vendee's refusal to accept he might sell advantageously at that time. Here, even though the plaintiffs had had the goods in the mean time, they could have done nothing with them, since they were the defendant's goods. The mere fact that defendant took his own goods cannot make him liable in any way. The whole case comes down to this, that the plaintiffs had not performed the work and labor as they had agreed, and therefore they cannot recover.

CORPORATIONS — EQUITABLE JURISDICTION. — *Held, inter alia*, that a *de facto* corporation, as such, may maintain a bill in equity to restrain its directors from ignoring its existence, wrongfully usurping and using its corporate name and franchise, etc. *Union Water Co. v. Kean*, 27 Atl. Rep. 1015 (N. J.).

This point, it would seem, is of no special difficulty or novelty, but the case deserves mention on account of the careful treatment given by the court to cases involving equitable and *quo warranto* proceedings as applied to corporations and stockholders. There is a particularly neat exclusion by Pitney, V. C., of decisions in which the equitable remedy has been denied, not because of the incapacity of a court of equity to deal with the subject-matter of the question presented, but because of the complaint not having been made by the party who had a right to complain. The vice-chancellor also gives a clear exposition of the requisites of *de facto* corporate existence.

CORPORATIONS — LIABILITY OF A PROMOTER. — A, having agreed to purchase land in Louisiana from B, issued a prospectus for the formation of a company to carry on the business of raising fruit; procured shareholders; and attended the meetings, at the first of which he was elected president. By authority of the shareholders, A was empowered to pay a much larger price for the land than he had agreed on, but he carried out his bargain with B on substantially the terms first made. *Held*, that A had acted as agent of the corporation, and could not keep the profits he had made from the transaction. *Plaquemines Tropical Fruit Co. v. Buck*, 27 Atl. Rep. 1094 (N. J.).

The facts of this case are somewhat complicated, but the decision seems sound. It is certainly a just result that one who gets up a company should be compelled to account for any profits which he may have made by fraudulently concealing the true state of affairs. The court takes pains to distinguish this case from one where a promoter, acting in good faith, sells land to a corporation at an advance in price. For a

discussion of the subject, see the opinion of Lord Cairns in *Erlanger v. Phosphate Co.*, 3 App. Cas. 1218. The authorities are collected in 1 Mor. Private Corp., §§ 545, 546.

CRIMINAL LAW — AGE OF ACCOUNTABILITY. — *Held*, that an erroneous instruction that the age of presumptive legal accountability for crime begins at eleven, instead of at fourteen, may be sufficient ground for reversal of judgment, although the accused was concededly two months over fourteen when he committed the act. *Brewer and Brown, JJ.*, dissenting. *Allen v. United States*, 14 Sup. Ct. Rep. 196.

It is difficult to see how the error was prejudicial to the prisoner. The court say that it was, because the jury were led to believe that the prisoner had been under the weight of full accountability three years longer than was the fact. But he was fully accountable; the defence asked for no instructions on this point, and the jury saw the prisoner and were able to judge for themselves how mature he was. It seems strange to assume that this mistake in regard to irrelevant matter influenced the jury against the defendant. Judgment in this case was reversed mainly on another ground.

CRIMINAL LAW — EXTORTION — ATTEMPT TO COMMIT. — By New York Penal Code, § 552, "Extortion is the obtaining of property from another, with his consent, induced by a wrongful use of force or fear, or under color of official right." By § 34, "An act done with intent to commit a crime, and tending, but failing to, effect its commission, is an attempt to commit that crime." In an indictment for an attempt to commit extortion, it appeared that prosecutrix was not put in fear by defendant's threats, but parted with her money for the purpose of inveigling him into the commission of the crime. *Held*, that the indictment could not be sustained, since fear, a necessary element of the crime, was wanting. *O'Brien, J.*, dissented. *People v. Gardiner*, 25 N. Y. Supp. 1072 (Supr. Ct.).

It is submitted that the dissenting opinion is the more sound. It is admitted by the court that, if the completed act, accomplished as intended and attempted, would constitute a crime, there was here an attempt. But the act as contemplated by the defendant was the obtaining of the money by putting in fear. This act was not completed in this case, and so the substantive crime was not committed. But if completed it would have constituted extortion, and so it would seem that what was actually done amounted to an attempt. The case seems analogous to an attempt to pick an empty pocket, which is now universally held to be an attempt to commit larceny (1 Bishop, Cr. Law, 8th ed., § 743); and even more closely analogous to the cases holding that there is an attempt to obtain money by false pretences, when the money is parted with, without belief in the pretence. 2 Bishop, Cr. Law (8th ed.), § 488; *Reg. v. Hensler*, 11 Cox C. C. 570; *Reg. v. Mills*, 7 Cox C. C. 263 (*semble*).

CRIMINAL LAW — FORGERY — TWO CRIMES UNDER ONE INDICTMENT. — N. Y. Code, Crim. Proc., § 278, provides that an indictment must charge but one crime and in one form. Sec. 279 provides, further, that the crime may be charged, in separate counts, to have been committed in a different manner, or by different means. Sec. 521 of the Penal Code enacts that a person who utters a forged instrument is guilty of forgery in the same degree as if he had forged it. *Held*, that an indictment may in one count charge the forgery of an instrument and in another the utterance, on the same date and at the same place, of the same instrument. *People v. Adler*, 35 N. E. Rep. 644.

In an opinion by Gray, J., the court admit that forgery and uttering a forgery are two distinct offences, both at common law and under the code; but they regard this as an intermediate case. The learned judge argues that, whereas, before the code was passed, such counts could be joined in one indictment (see *People v. Rynders*, 12 Wend. 425), though different punishments were provided for the two offences; now, when the penalty for each is the same, there is all the more reason for upholding such an indictment, unless the language of the code expressly forbids it, which the court determines it does not. It may be, as Gray, J., says, that where the two offences are based on the same or a continuous state of facts, the prisoner is not prejudiced by such a form of pleading. Yet, without saying that the decision is wrong, it would seem that the court has given wide scope to the principle that statutes are in general to be interpreted by common-law rules.

EQUITY JURISDICTION — LIBEL ON PATENT RIGHTS — INTIMIDATION. — A court of equity will enjoin an insolvent person from publishing libellous statements regarding the validity of plaintiff's patents, and threatening all who deal with him with suits for infringement, which he had no intention of bringing, thereby intimidating the plaintiff's customers. *Shoemaker v. S. Bend Spark Arrester Co.*, 35 N. E. Rep. 280 (Ind.).

It seems pretty well settled by authority that equity will not restrain the publication of a libel, but will leave the parties to settle their rights at law. In *Boston Diatite Co.*

v. *Mfg. Co.*, 114 Mass. 69, where the complaint alleged that the defendant threatened certain persons with suits for infringement of their patent, the court dismissed the bill. It must be noticed, however, that the bill is chiefly to restrain the further publication of a libel, and mentions, but indirectly, the fact that the defendant threatened the plaintiff's customers with suits. In a case very like the one under discussion, *Enoch v. Kane*, 34 F. R. 46, Blodgett, J., says, "The *gravamen* of this case is the attempted intimidation by defendants of complainant's customers by threatening them with suits which defendants did not mean to prosecute." In the principal case the court leave the question open as to how they would decide in either the event of defendants being solvent; or if the wrong complained of was a libel merely. Had the court here refused to grant the plaintiff's petition, they would have cast a great hardship upon him, for which he had no remedy, as his action at law was worthless.

INSURANCE — NOTICE — WAIVER. — Plaintiff was the beneficiary in a policy taken by her husband in defendant Accident Insurance Society. One of the provisions of the policy was that failure to give notice of the death of the insured with full particulars of the accident within ten days from date of injury or death, would invalidate the policy. The insured was killed August 22d in the Park Place disaster, but his body was not found till the 25th. Notice was given the second of September. This notice was served without objection, and at subsequent dates the society furnished blanks for proof of loss, and asked for further particulars which were furnished. *Held*, (1) That the ten days do not begin to run until the fact of death and the circumstances are known. (2) That there was a waiver, assuming the ten days to run from the time of death, by the subsequent conduct of the defendant. *Trippe v. Provident Fund Society*, 35 N. E. 316 (N. Y.).

The point as to waiver is eminently sound and in accord with the weight of authority. *May on Ins.*, sect. 465. The question about notice seems, strangely enough, to be a new one. There can be no other decision reached but the one the courts render; for the particulars were to be furnished, and of course they could not be given until the death was known. The opposite holding would be to make the plaintiff contract to do an impossible thing, — which, of course, was not the intention of the parties at the time of contracting.

JUDGMENT — DIRECT ATTACK — WAIVER. — The justice of the peace before whom the action was originally tried was plaintiff's agent for the collection of claims, including the claim sued on. These facts appearing on an appeal to the circuit court, it was *held*, that a motion to dismiss the appeal was properly denied, it not appearing when defendant first acquired knowledge of the facts. *Ross, J.*, dissenting. *Baldwin v. Runyon*, 35 N. E. Rep. 569 (Ind.).

The court admit that the objection is fatal if taken as soon as known. If not taken then, however, it is waived, and the burden of proof is on the one objecting to show that his objection is taken as soon as known. As that did not appear in the present case the defendant was held to have waived his right of objection. The principle involved seems to be the same as in the case of disqualification of jurors. It is generally held in those cases that the objection must be made as soon as discovered, or the party objecting will be held to have waived it. *Graham and Waterman on New Trials*, (2d ed.) pp. 239, 247.

PARTNERSHIP — INSOLVENCY — PROOF OF A FIRM NOTE INDORSED BY ONE PARTNER. — *Held*, that the holder of a firm note, made payable to one of the partners and indorsed by him, may prove against the estates of the firm and the indorsing partner, before a receipt of a dividend from either. *Roger Williams Nat'l Bank v. Hall et al.*, 35 N. E. Rep. 666 (Mass.).

This decision is eminently just and would generally be followed in the United States, but in England the rule formerly was *contra*. Lord Eldon, in *Ex parte Bevan*, 10 Ves. 107, said, "I could never see why a creditor having both a joint and a several security, should not go against both estates. But it is settled that he must elect." The English law has been altered by 32 & 33 Vict. chap. 71, § 37, which permits proof against both estates in such a case. See *Ex parte Honey*, L. R. 7 Ch. App. 178, which is a case decided under the said Act.

PARTNERSHIP — OUTSIDE TRANSACTIONS BY ONE PARTNER — RIGHT OF OTHER PARTNERS TO PROFITS. — *Dictum*, following *Dean v. Macdowell*, 8 Ch. Div. 345, that a bill cannot be maintained against one partner by his fellows for a share in the profits of transactions outside the scope of the partnership, though engaged in by him in violation of an express agreement with the firm, unless by violation of the agreement profits have been diverted from the partnership business; and further, following *Aas v. Benham*, [1891] 2 Ch. 244, that co-partners are not entitled to share the profits earned by a member of the firm acting for himself on information gained in carrying on the partner-

ship business, if such information has not been used for purposes within the scope of the partnership. *Latta v. Kilbourn*, 14 Sup. Ct. Rep. 201, 210-211.

These *dicta* are unquestionably correct; but they are noted here because there has been almost no law on the points except the two English cases.

PARTNERSHIP — SALE OF PARTNER'S INTEREST — REFUSAL BY BUYER TO PERFORM — DAMAGES. — The plaintiff agreed with the defendant to sell him an undivided interest in a partnership of which he, the plaintiff, was a member. The defendant wrongfully refused to perform his part of the contract of sale, and a question arose as to the damages to which the plaintiff was entitled. It was argued by counsel for the defence that since the assets of the partnership consisted of real estate, the rule of damages to be applied was that which pertains to sales of real property. *Held*, however, that the plaintiff should recover damages according to the rule applicable to sales of personalty, since the undivided interest in the partnership was personal property. *Van Brocklen v. Smeallie*, 35 N. E. Rep. 415 (N. Y.).

This result is a logical and interesting consequence of the underlying theory of such cases as *Menagh v. Whitwell*, 52 N. Y. 146; *Morris v. Gleason*, 64 N. Y. 204; and *Tarbell v. West*, 86 N. Y. 287. "It is now well settled," said Andrews, J., in the last case, "that a purchaser from one partner, of his interest in the partnership, acquires no title to any share of the partnership effects, but only his share of the surplus, after an accounting and an adjustment of the partnership affairs."

In these New York decisions one finds a gradual and desirable recognition by the courts of a partnership as an entity, — of the mercantile view of a firm as an impersonal being which has independent rights. This conception of a partnership, caused by the decision of the House of Lords in the case of *Cox v. Hickman* (8 House of Lords Cases, 268), has recently received a clear and useful explanation from Professor Beale in chapters I. and V. of *Parsons on Partnership* (4th ed.). The definition there given of a partnership is as follows: "Partnership is a legal entity formed by the association of two or more persons for the purpose of carrying on business together and dividing its profits between them."

QUASI CONTRACT — PAYMENT BY STRANGER — BINDING ON CREDITOR. — Suit in equity. Defendants were indebted to plaintiff. Without request or ratification by defendants, the debt was paid to plaintiff by a stranger. *Held*, such payment discharges the debt so far as the creditor is concerned, and also as to the debtor if he ratify it. *Crumlish's Adm'r. v. Cent. Imp. Co. et al.*, 18 S. E. Rep. 456 (W. Va.).

The decision may be noted as to the part affecting the creditor. In England, the prevalent view, first laid down in *Grymes v. Blofield*, Cro. Eliz. 541, continues to be, that payment by a stranger of a debt without the privity of the debtor does not discharge the debt, even as to the creditor. This, however, has been questioned by Willes, J., in *Cook v. Lister*, 3 C. B. N. S. 594, and by Cresswell, J., in *Jones v. Broadhurst*, 9 M. & Sc. 173. In this country the doctrine as held in the principal case is law in California, Wisconsin, Ohio, Alabama, and Iowa. Although it seems quite unjust that a creditor accepting payment of a debt from a stranger should be allowed to maintain an action against the debtor for the same debt, on the technical theory that he is a stranger to the consideration, yet the reasons advanced against the policy of allowing strangers to meddle with contracts might be applied in this case. And on this question the same division of opinion is likely to exist in the courts of this country as exists in reference to the rights of third parties to sue on contracts.

REAL PROPERTY — CY PRES — CHARITIES. — Property was given to a college for the purpose of educating poor young men for the ministry. After the fund had vested, the college, through lack of money, suspended the exercise of its functions. *Held*, that this did not cause a reverter of one half of the fund to the grantor's heirs, but that equity would cause it to be applied through another college to effectuate in the same manner the original purpose, and in case the first college resumed its duties, then the property would be restored to it. *Barnard v. Adams*, 58 F. R. 313 (C. C. N. D. Iowa).

It is strange that the court here did not notice the case of *Miller v. Chittenden*, 2 Iowa, 315, where Wright, C. J., says, at page 369: "Though the deed may clearly manifest a charitable or benevolent disposition, it will only be executed or upheld for the benefit of the object designed, and will not be in favor of some other similar object. . . . We need not add, therefore, that the doctrine of *cy pres*, at least in its original form, as administered in the English courts, has no application here." *Barnard v. Adams* is unquestionably right if the *cy pres* doctrine is in force in Iowa, but the *dictum* of Wright, C. J., seems an express repudiation of it. It is to be hoped that the case in the Federal court will be followed.

REAL PROPERTY — RULE AGAINST PERPETUITIES. — The testator devised in trust for the lives of his son and daughter, and after their deaths upon trust to sell; and as to the proceeds of such sale and the rents and profits to arise from the property until sale, to pay the same equally to the children of the son and daughter, and the lawful issue of such of them as might be then dead leaving issue, such issue to be entitled to no more than their parent would have been if living. *Held*, that the trust for sale was bad as violating the rule against perpetuities. That the trusts of the property and the rents and profits thereof were good, and that the interest of a deceased beneficiary descended as realty. *Goodier v. Edmunds*, [1893] 3 Ch. 455.

REAL PROPERTY — STEAM RAILROADS IN STREETS — ADDITIONAL SERVITUDE. — The use of a street for a steam railroad is not a legitimate use for public purposes, and if abutting property is injured thereby the owner is entitled to damages, whether the fee of the street be in him or in the city. *White v. N. W. No. Car. R. Co.*, 18 S. E. Rep. 330 (N. C.).

This is a case of first impression in North Carolina, and the court follow the great weight of authority in this country. Although it would seem difficult to reach any other conclusion on common-sense grounds, there has nevertheless been a certain amount of conflict on this question, especially as to whether an abutting owner may recover damages where the fee of the street is in the public. The subject is fully discussed and cases cited in Lewis on Eminent Domain, §§ 111-115, Elliott on Roads and Streets, 528. Pierce on Railroads, 234, 238, approves the contrary doctrine.

SALES — CONDITIONS — RIGHT TO RETURN. — Plaintiffs sold defendant a reaper upon the condition that if it did not work to his satisfaction he might return it. After a trial he wished to return it, giving as his reason that it was too heavy for his horses, and other whimsical objections. Plaintiffs refused to receive it, and sued him for the purchase price. The court below instructed that "if the contract was that the machine was to give satisfaction to the defendant, then it should be a fair and reasonable satisfaction, and not a whimsical or unreasonable satisfaction." On exception, the Supreme Court *held* that this instruction was wrong; that if the dissatisfaction is honest, no matter how unreasonable, the defendant is relieved of all liability. *Osborne & Co. v. Francis*, 18 S. W. 591 (W. Va.).

This case is in accord with the great weight of authority. See Benjamin on Sales (Bennett's 6th ed.), pp. 568-70. For a case almost identical, see *Seeley v. Welles*, 120 Pa. St. 75. It makes no difference whether it is regarded as a sale with a condition subsequent rendering it void, or as a contract with a condition precedent. In either case, if the agreement is that goods are to be "to the satisfaction" of the vendee, he can reject even whimsically as he has contracted for that right.

SALES — STOPPAGE IN TRANSITU — EFFECT UPON RIGHTS OF PARTIES. — *Held*, that a vendor who has stopped in transit part of the goods sold, and has never offered to deliver them on payment of the contract price, is entitled in the vendee's insolvency proceedings to compensation only for the part of the goods actually delivered to the vendee, since it is presumed after a reasonable time that the vendor has taken the goods stopped in transit in full payment for their price. *Shaw et al. v. Lady Ensley Coal, Iron, &c. R. Co.*, 35 N. E. 620 (Ill.).

This case recognizes the rule of law that the vendor, in exercising his right of stoppage *in transitu*, takes the goods as those of the vendee, and receives merely a lien upon them for the contract price, and undoubtedly places the true construction upon his failure to demand the contract price and to offer the goods to the vendee upon such payment. See 23 Am. & Eng. Encyc. of Law, 932, note 2, and cases there cited.

STATUTE — CONSTRUCTION OF. — A statute of the State of New Jersey, passed Nov. 21, 1794, provides that "all proceedings whatever in every court of law or equity of this State are required to be in the English language, and in no other." On March 16, 1891, the statute was passed on which this action was brought. It provides that all notices of sales of land by virtue of judicial proceedings shall be inserted in two newspapers, and that "In all counties wherein there is now published a paper in the German language, it shall be the duty of the officer in charge of the sale also to publish the notices in such paper." *Held*, that since the statute of 1891 did not expressly repeal that of 1794, it must if possible be given a construction reconcilable with it, and that therefore the notice to be inserted in the German paper should be written in the English language. *Tappan v. Dayton et al.*, 28 Atl. Rep. 1 (N. J.).

This decision shows how far courts, in construing a statute, will depart from the probable intention of the Legislature, rather than consider it to repeal by implication a statute previously existing. "Laws are presumed to be passed with deliberation and

with full knowledge of all existing ones on the same subject, and it is therefore reasonable to conclude that the Legislature, in passing a statute, did not intend to interfere with or abrogate any prior law relating to the same matter, unless the repugnancy between the two is irreconcilable." Sedgwick, St. Const. 106.

TORTS — SELF-DEFENCE. — The defendant, in order to protect himself from X who carried a bag of dynamite, took the plaintiff's hand, and so gently drew him between himself and X that plaintiff was barely conscious of the impulse. An explosion of dynamite followed, by which plaintiff was injured. *Held*, the defendant was liable if he deliberately placed the plaintiff as a screen between himself and the danger. It was a question for the jury whether his action was intentional or a mere reflex resulting from the acts of X. *Laidlaw v. Sage*, 25 N. Y. Supp. 955.

For a discussion of this case, see 7 HARVARD LAW REVIEW, 302.

TRUSTS — STATUTE OF LIMITATIONS. — A fund was held by trustees for A and B equally, for their lives, and then the share of each to go to his children. The trustees gave this fund to a solicitor, who invested it, with money belonging to other persons, in an equitable mortgage. This mortgage was paid off, and, A having died, the solicitor gave A's share to his children, and kept B's share in his own hands. The solicitor then died. Twelve years after, B brought action for his moiety against the solicitor's executrix. *Held*, that the statute of limitations was no bar on the ground that the solicitor had been an express trustee, and that therefore B could recover. *Soar v. Ashwell*, [1893] 2 Q. B. 390.

The general rule is that the statute of limitations does not begin to run in favor of an express trustee until he has done some act which is inconsistent with or repugnant to the fiduciary relation which he bears to the *cestui que trust*. A constructive trustee, on the other hand, becomes such because of his wrongful act and adverse claim, and hence the statute runs in his favor from the first. The distinction between an express and a constructive trustee in this respect is neatly exemplified in the above case. The facts showed quite clearly that a fiduciary relation, rather than a relation of debtor and creditor, arose between the solicitor and those who intrusted to him the fund. B's cause of action, therefore, is based on the mere failure of the solicitor to hand over the moiety. This of itself showed no adverse claim of title by the solicitor sufficient to make him a constructive trustee, and hence, the fiduciary relation continuing to exist, the statute never began to run. The decision seems clearly right. See 2 Lewin on Trusts (9th ed.), 983 *et seq.*

REVIEWS.

SPEECHES AND ADDRESSES OF WILLIAM E. RUSSELL. Selected and Edited by Charles Theodore Russell, Jr. With an Introduction by Thomas Wentworth Higginson. 8mo, pp. 469. Boston: Little, Brown, & Co., 1894.

The remarkable success of Governor Russell's career must of itself lend a certain interest to a collection of his speeches and addresses, whatever their intrinsic merit. To the discreet reader, curious to fathom the reasons of this success, much is here suggested. The speeches on the tariff show Governor Russell's method at its best. He investigated thoroughly the industries of each town in which he spoke, and drew inferences from the daily life of the people who heard him. He was not content with generalities, but sought to drive his meaning home. In permitting a number of his speeches to be thus collected in permanent form, he "has acted," as Colonel Higginson says, "wisely — and, at any rate, frankly — showing himself at his average, without apology and without

flinching, and taking the risk that all his themes may not prove alike interesting. . . . Should Mr. Russell ever be called to re-enter public life, his whole platform up to this time has been presented without concealment in these pages."

E. B. A.

THE GREEN BAG. Vol. V. 1893. Boston, The Boston Book Co.

A binding is ordinarily praised because of deficiencies within it, but the binding of this volume of the Green Bag deserves mention on account of its appropriateness to an inside by no means deficient. A department conducted by Irving Browne, and called the "Lawyer's Easy Chair," is an improvement of the past year, and the sketches of courts, biographies of judges and lawyers, and other light legal miscellany, continue to make the magazine interesting and amusing to the profession.

R. W. H.

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NO. 8.

RESPONSIBILITY FOR TORTIOUS ACTS: ITS HISTORY. — III.

IN the first article of this series we noticed briefly the development of the primitive superstitious and irrational conception through several stages, in each of which the change in social growth led to discriminations based more and more on rational ideas;¹ but we left this growth at a period — the Norman Conquest — when the primitive notions, by which the responsibility for harm was associated with certain sources, were by no means left behind. Of the subsequent forms of this development in the realm of Agency we have seen something in a second article. It remains to trace the change in the other groups, — a process much more complicated. The groupings there made for convenience —

¹ In addition to the authority of Prof. Dr. Brunner (in the former article) on the nature of primitive Germanic notions, may here be noted a quotation from an article, by M. P.-F. Girard ("Nouvelle Revue Historique," etc., 1888, at p. 38), on the Roman Noxal Actions, in which a similar development in Roman Law is demonstrated: "There is a phenomenon which one can discern throughout all antiquity, — that is, vengeance, the physical, unreasoning emotion, which drives the victim of an injury to a violent reaction against the immediate author of the injury. He who regards himself as offended against, takes vengeance for the offence as he will and as he can, alone or with the help of others, recognizing only the brute fact that he has suffered, and dominated by a feeling of resentment measured solely by the harm he has undergone. . . . The victim of the harm knows nothing but the harm done to him. He does not concern himself with the intent of the doer. . . . He therefore revenges himself for the harm-causing act, even though it may have been unintentional. . . . Moreover, for the same reason, the victim takes his revenge, even where the immediate author of the harm is not capable of intending it, — where it is not a human being, but an animal, or an inanimate object."

harm from (a) a personal deed, (b) an animal, (c) an inanimate thing — must here be abandoned, and the line of tracing must be accommodated to the groupings which are most marked in the precedents of 1300–1800; the effort in hand being always to make out the subjective course of legal thought in its progress towards the accepted standards of to-day. The topics then may be followed down in this order: 1. Personal Deed; 2. Self-defence; 3. Deed of an Infant and of a Lunatic; 4. Keeping of Fire; 5. Keeping of Animals, with reference to (a) land trespasses, (b) trespasses by biting, etc.; 6. Keeping of Dangerous Things in general.

1. *Personal Deed*. — Here, about the 1200s, the responsibility was still absolute, and irrespective of personal blame in producing the harm. In homicide, at least, the slayer by misadventure forfeited his goods and paid some fine or fee to the king, though his life was spared; while in probably all torts the harm-doer paid some compensation to the injured party. What we have to note is, first, that no distinction as to negligence or the like was yet made; it was either “misadventure,” “unwitting,” — that is, not intentional, — or wilful, intentional. Secondly, we note that the state of things still corresponded in essence with prevailing ethical notions; the man was getting fair dealing as far as the standards of the time went. Our object must be to discover how and when the notion got away from these tests. The first circumstance we perceive is that the penal law was already getting away from them, as is shown by the sparing of the life; and as the purposes of a penal law became more and more clearly realized, we may suppose that the penal treatment grew less and less rigorous as time passed; though the forfeiture remained in name at least even in Blackstone’s time. But a distinction was early made between penal and civil consequences, as the case 6 Edw. IV., *infra*, indicates. This rested probably on the ground, still very properly accepted, that “in all civil acts the law doth not so much regard the intent of the actor as the loss and damage of the party suffering” (1681, *Lambert v. Bessey*, *infra*). But to-day we do certainly consider, not merely the sufferer’s damage, but the blamableness of the defendant’s conduct; while no such distinction was yet made, in the 1300s, even in cases of mere “misadventure.” We have still therefore to trace the transition in this respect. Now, it has been generally supposed that until the present century (earlier in this

country,¹ later in England²) the old notion continued, that the rationalization never proceeded any further than to posit a voluntary act by the defendant ; that if from a voluntary act a Trespass — that is, a direct and immediate injury — followed, nothing could save the defendant from civil responsibility.³ And no doubt this came to be at least the preliminary test, the *sine qua non*, showing itself most prominently in the rule of pleading that if there had been no such voluntary act, then there was not even a *prima facie* Trespass.⁴ But more than this the whole course of precedents and of contemporary legal opinion does not allow us to believe. The evidence seems certain that the rationalization towards the line of present standards began at a much earlier period than has been supposed. In other words, there has never been a time, in English law, since (say) the early 1500s, when the defendant in an action for Trespass⁵ was not allowed to appeal to some standard of blame or fault in addition to and beyond the mere question of his act having been voluntary ; *i. e.* granting a voluntary act, he might still excuse himself⁶ (apart from excuses of self-defence, consent, and the like). At first this test, naturally, was vague enough. "Inevitable necessity," "unavoidable accident," "could

¹ Vincent *v.* Stinehour, Harvey *v.* Dunlop, Brown *v.* Kendall (1835-1850), in Appendix.

² Stanley *v.* Powell (1891), in Appendix.

³ See, for example, the language of Grose, J., in Leame *v.* Bray (Appendix) ; the argument for the defendant in Holmes *v.* Mather (Appendix) ; Lord Cranworth, in Fletcher *v.* Rylands, L. R. 3 H. L. 330 : "When one person, in managing his own affairs, causes, however innocently, damage to another, it is obviously only just that he should be the party to suffer ;" and 5 Harv. Law Review, 36 : "The rule, so well settled in America, that inevitable accident is a good defence to an action of trespass for personal injuries, has not hitherto found entire favor with the English courts. There crept very early into the English law a principle, which the courts have been slow to repudiate, to the effect that he who acts voluntarily acts at his peril, and is responsible for personal injuries to another resulting from his acts, though the injury be the outcome neither of wilful wrong-doing nor of negligence. The few cases in which a defence has been allowed have been decided either upon principles of expediency or upon questions of pleading. . . . The English judges have obstinately refused to adopt squarely the reasoning of the American courts, that where a man uses due care he is not responsible for results which could not have been foreseen, and, while practically arriving at the same results in a number of cases, have based their decisions upon narrow and unsatisfactory grounds." The writer's opinion, originally to this effect, was not changed until the evidence below was laid before him.

⁴ Gibbons *v.* Pepper, 1 Ld. R. 38 ; Knapp *v.* Salsbury, Boss *v.* Litton, Goodman *v.* Taylor, Hall *v.* Fearnley, *infra*, Appendix.

⁵ For a qualification as to trespasses to realty and to personalty, see *infra*.

⁶ Originally the distinction requiring this to be done by an affirmative plea in justification seems not to have prevailed.

not do otherwise," served indiscriminately to hit off, in judicial language, the reasons of justice on which they equally exempted him who acted in self-defence, and him who had not been to blame for what we now call "negligence," and him who trespassed on the plaintiff's land to avoid a highway attack.¹ The phrases, "non potuit aliter facere" and "inevitable necessity," served as leading catchwords for many centuries;¹ and even up to the 1800s we find court and counsel constantly interchanging "inevitable accident" and "absence of negligence or blame."² The precedents show us, then, that somewhere about 1500 a decided sloughing-off of the last stage of the primitive notion took place, and a defendant could exempt himself in this sort of an action if his act, though voluntary, had been without blame; the standard being more indefinite, and perhaps not as liberal, as to-day, but not different in kind. The statements and interpretations of standard contemporary authors may also be noted as pertinent data towards what we are searching for, the estimates of legal responsibility actually prevailing. But it would seem that towards the latter half of this century the opinion at the bar in England misconceived the lan-

¹ Br. N. B. iii. 229, No. 1216 (A. D. 1236-37), where in a killing in defence he is pardoned, the test being "quia non potuit aliter evadere manus eius;" ib. iii. 107, No. 1084 (A. D. 1225), "aliter enim mortuus esset;" (1319) Y. B. 12 Edw. II. 381, "since the defendant could not otherwise escape;" (1459) 37 H. VI. 37, pl. 26, the defendant trespassed to avoid the attack of the plaintiff on the highway, held justifiable, "because he could not do otherwise than this;" Choke, C. J., in *Thorn-cutting case* (6 Edw. IV. 7, 18, 1466): "As to what was said about their falling in, *ipso invito*, that is no plea, but he ought to show that he could not do it in any other way, or that he did all that was in his power to keep them out;" see also Catesby, *in arg.*; Britton (Nichols), i. 15, "from necessity to avoid death;" Bacon, Maxims, v., "impossible to do otherwise;" Blackstone, J., in *Scott v. Shepherd*: "Not even menaces from others are sufficient to justify a trespass against a third person . . . nothing but inevitable necessity," citing *Weaver v. Ward*, *Dickenson v. Watson*, *Gilbert v. Stone*; counsel in *Gibbons v. Pepper*, 4 Mod. 405, "for it was no neglect in him, and the mischief done was inevitable;" and the authorities in the Appendix, *passim*.

² Buller's *Nisi Prius*, *infra*, "that it was inevitable, and that he committed no negligence;" Comyn, *infra*, "inevitable and without any neglect;" Espinasse, *infra*, "involuntary and without fault;" Lord Denman, in *Boss v. Litton*, *infra*, "inevitable accident," *i. e.* "one which the defendant could not prevent;" Patteson, J., in *Cotterill v. Starkey*, *infra*, to the same effect; Nelson, C. J., in *Harvey v. Dunlop*, *infra*, "from inevitable accident, or which in law or reason is the same thing, from an act that ordinary human care and foresight are unable to guard against;" Center v. Finney, *infra*, "wholly unavoidable and no blame imputable;" Selden, J., in *Dyert v. Bradley*, *infra*, "When we speak of an unavoidable accident, in legal phraseology, . . . all that is meant is that it was not occasioned in any degree, either remotely or directly, by the want of such care or skill as the law holds every man bound to exercise;" and other cases *passim*.

guage of some of the earlier cases,¹ and it became necessary to review them in two cases (*Holmes v. Mather*, 1875; *Stanley v. Powell*, 1891), in which the doctrine was finally settled for England that the defendant's attention to the requirements of due care may be (not necessarily always is) a defence, even where a trespass has been done. The same doctrine ("there must be some blame or want of care and prudence to make a man answerable in trespass") had long before been laid down in this country, and that, too, purely as a matter of the right reading of the precedents.²

In trespasses to personalty³ and to realty there had originally been a disposition, at the time the general tendency to mitigation began, to carry it out in this field also. For instance, *Rede, C. J.*, in 21 H. VII. (1506),⁴ declared that "where the executors take the goods of a stranger with those of the testator, they are excusable for the taking in trespass," because "one cannot *prima facie* know perfectly which goods belong to the testator and which to the stranger;" and the excused trespass of the oxen in 22 Edw. IV. (1483) 8, 24, seems to rest on a similar notion, while *Choke, C. J.*, shows it clearly in the Thorn-cutting case (1446).⁵ But this tendency soon disappeared,⁶ probably for reasons of policy, which are still accepted as valid;⁷ and no such defence is now admissible, except in trespasses or conversions of personal property under exceptional circumstances.⁸

2. *Self-defence.* — Here, as we have already seen, the Statute of Gloucester (1278) provided that, in crown cases, the slayer in self-defence (though forfeiting his goods) should receive a pardon by the king's favor if he pleased. The earlier cases of this sort are: (1302) Y. B. 30-31 Edw. I. 513 (Rolls ed.); (1338) Y. B. 12

¹ Probably owing chiefly to the expressions of *Grose, J.*, in *Leame v. Bray* (Appendix). These, taken apart, appeared to support, and perhaps were intended by him to support, the stricter view. The other and later cases show that Lord Ellenborough (also a judge in *Leame v. Bray*) did not hold it.

² See *Vincent v. Stinehour*, *Harvey v. Dunlop*, and other American cases in the Appendix.

No doubt the doctrine of "acting at peril" to-day covers the situations involved in some of these cases; for this see the last head in this article.

³ Including cases where to-day trover would lie.

⁴ Quoted in Appendix.

⁵ 6 Edw. IV., in Appendix.

⁶ *Basely v. Clarkson*, 3 Lev. 37 (1681). But it perhaps lingers in *Beckwith v. Shordike*, Appendix.

⁷ See *Holmes*, "The Common Law," 151.

⁸ E. g. *Wellington v. Wentworth*, 8 Metc. 548.

Edw. III. 533 (Rolls ed.); (1338) Y. B. 21 Edw. III. 17, pl. 22; (1349) Fitzh. Abr., "Corone," 261; (1370) *ib.*, 94, 41 Ass. 21 (1368, appeal of mayhem). Yet the practice as to a pardon varied, for in two of these cases (1302, 1349) the defendant was apparently set free immediately.¹ By 1624 (Dever's Case, Godbolt, 288) the forfeiture was not required. In civil actions of trespass, however, the mitigation was longer in coming. In 1294² and in 1319³ the defendant was obliged to respond; but in 1400,⁴ and ever since, the plea is accepted as a complete defence. Yet its whole scope was not fully realized at first. For instance, in the very case preceding that of 1302, in which the defendant was set free for killing a wheat-thief in self-defence, the defendant (in a crown case) who killed a wheat-thief in defence of his brother was sent to prison;⁵ and in 1436,⁶ when it was agreed that in all justice "it is lawful for a man to aid his master," it seems to be a case of first impression.

3. *Lunatics and Infants*. — The natural result of the primitive notion would be to hold the lunatic liable, no less than the slayer by misfortune; and in fact the two stood at this time on the same footing.

"It was presented that a certain lunatic wounded himself with a knife, and, after he recovered from his infirmity [lunacy] and received the rites of the church, he died of his wounds; his chattels were confiscated" (1315).⁷ In 1330 a lunatic homicide is given a king's charter of pardon.⁸

But the popular superstitions in such matters prevented as rapid an approach as might have been expected towards a rational treatment, even in criminal cases, of lunatic harm-doers, as is shown by the condition of prisons and of the legal tests of lunatic responsibility up to the present century. It would seem that a similar inability to make allowances served for a long time as in part a basis for tortious responsibility; though doubtless as much or more influence is to be attributed to the maxim, so powerful in the sphere of deeds and contracts, that "no man of full age shall be, in any plea to be pleaded by him, to be received by the law to stultify himself."⁹ However, by Lord Bacon's time, the principle was

¹ A pardon was required as late as 1489 (Fitzh. Abr., "Corone," 61).

² Y. B. 21-22 Edw. I. 586 (Rolls ed.).

³ Y. B. 12 Edw. II. 381 (Rolls ed.).

⁵ Y. B. 30-31 Edw. I. 518 (Rolls ed.).

⁷ Fitzh. Abr., "Corone," 412 (1315).

⁹ Beverley's Case, 4 Co. R. 123 b (1603).

⁴ Y. B. 2 H. IV. 8, pl. 40.

⁶ 14 H. VI. 24, pl. 72.

⁸ *Ib.* 351.

maintained in the form that a lunatic was responsible for his torts in the same way as an ordinary person.¹

The development was quite otherwise with the responsibility of Infants. In Germanic custom the male child was without a standing in the community as an obligor or an obligee. Like the master for the slave, the father answered for and made claims on behalf of the child.² The ceremony of investing him with arms as a *wehrhaft*, or weapon-bearing member of the community, was the usual period for the assumption of rights and liabilities; and this customarily (not always) took place at the age of twelve. Hence we find, in Anglo-Norman days, the age of twelve years as the earliest at which liability can begin (and that for boys and girls equally).³ We soon see, however, a tendency to reduce this age-limit,⁴ and the twelve-year rule came to be disregarded in criminal cases;⁵ while a seven-year limit appears in later criminal law as the subject of a presumption against criminal intent.⁶ The case of 35 H. VI. 11, pl. 18 (1457) is usually given as the first in which an infant was held liable in Trespass.⁷ But the language of

¹ Bacon, Maxims, vii. (1630); *Weaver v. Ward*, Hobart, 134 (1616).

² See Brunner, *Deutsche Rechtsgeschichte*, i. 76; and some references to Anglo-Saxon laws in Hale's Pl. Cr. i. 20 ff. Notice the same notion of legal disability in one of the two forms of the writ of pardon for infants in the *Registrum Brevium* (309 b), where the infant is discharged, but is to come up again and answer, if any one raises the question after he has arrived "*ad legitimam ætatem*."

³ Temp. Edw. I. Y. B. 30-31 Edw. I. 529 (Rolls ed.). A boy had set up a mark inside the house, and in shooting, his arrow accidentally went without and killed a woman. Justiciarius: "Since he is not of the age of twelve years he is not a felon, but good and loyal." And as he had absconded, it was publicly proclaimed that he might return if he would.

⁴ 1302. Y. B. 30 Edw. I. 511 (Rolls ed.). One who killed in defence of his brother was committed to prison; and it was said that he was under twelve years of age. Spigurnel, J.: "If he had done the deed before his age of seven years he should not suffer judgment; but if he had done any other deed not causing the loss of life or limb, though against the peace, he should not answer, because before that age he is not of the peace." The taking of seven years seems to be a borrowing from the Roman law. See Hale's Pl. Cr. i. 20 ff.

⁵ 1338. Y. B. 12 Edw. III. 627 (Rolls ed.): "Itan, a girl of thirteen years, was burnt for that while she was the servant of a [certain] woman she killed her mistress; and [this] was [so] found; therefore adjudged [to be] treason. And it was said that by the old law no one under age was hung, or suffered judgment of life or limb. But Spigurnel found [a case] that an infant of ten years killed his companion and concealed him, and he was hung, since by the concealment he showed that he knew how to distinguish between evil from good. And thus *malitia supplet ætatem*."

⁶ Reg. v. Smith, 1 Cox Cr. C. 260.

⁷ The child was four years of age. The judge says: "Can you find it in your conscience to declare against this child of so tender an age? I think that he did not know

the Court there shows (the penal idea being still at that time attached to the idea of a trespass) a disposition to exempt the infant; and the reason given for refusing to discharge him as incapable of discretion (that the possibility of a plea of justification takes the power from the Court) does not put the case on any ground of the immateriality of intention. Moreover, in 1611¹ it was resolved by the Court that a writ of *capiatur* would not be issued in an action of *vi et armis* against an infant; and in Temp. Car. I.² an action of Case for slander against an infant was sustained on the ground that *malitia supplet ætatem*. However, about this time we find infants ranked with lunatics as liable civilly on the general ground that the intent (*i. e.* bad intent, bad motive) was immaterial.³

4. *Keeping of Fire*. — Here the old responsibility, in its strictest form, continued down to Queen Anne's reign, and for almost the whole period, we may believe, as sanctioned by popular notions.⁴ The short name of the action ("for negligent garder son feue") is a misleading one; it means merely "for *failing* to keep in his fire," and the responsibility was absolute, as may be seen from the words of the writ⁵ (*quare . . . homo et femina . . . ignem suum die ac nocte salvo et secure custodire teneatur, ne pro defectu custodiae,*" etc.), and from the proceedings in *Beaulieu v. Finglam* (1400),⁶ where any question of blamableness is excluded.⁷ The primitive

any malice, for he is not of great strength, and you can see that before your own eyes." Counsel replies that the fact remains that one of his client's eyes is out. Counsel for defence claims that as in felony the Court can dismiss the case if they think his youth shows that he did not know he was doing wrong. But Moyle refuses, because in felony there is only a plea of not guilty, and no justification, and so "the justices have it in their discretion to dismiss him if it appears to them that he is of such an age that he has not discretion; but otherwise in trespass, for in a writ of trespass the party may justify the trespass, and not plead not guilty, and so the justices have no such power." Then a guardian is appointed, and the defendant's counsel is granted an adjournment for a conference.

¹ *Holbrooke v. Dagley*, Cro. Jac. 374.

⁸ Bacon, Maxims, vii.

² *Hodsmen v. Grissell*, Noy, 129.

⁴ The same popular attitude seems to have lingered in other countries; *e. g.* in Japan the responsibility for accidental fires continued, in the rural communities, into the present century; and during a recent residence in Tokyo the writer's landlord tried to have inserted in the lease a clause making the tenant responsible for all fires originating within the house.

⁵ Rastell, Entries, 8.

⁶ 2 H. IV. 18, pl. 6.

⁷ The case in 42 Ass. pl. 9 (1369), where the plaintiff lost in an action where the jury found that the fire *fuist suddenment illumine*, the defendant knowing nothing, is not conclusive to the contrary; for (1) it does not appear that the defendant set the fire;

idea is seen remaining in the argument there made and rejected, that "the fire could not be alleged to be *his* fire, because a man cannot have property in fire."¹ In *Tuberville v Stamp* (1698)² the old tradition was still adhered to ("be it by negligence or by misfortune, it is all one"); though the intervention of a sudden wind-storm was treated as an available excuse.³ In 1700⁴ a similar action failed, apparently only by bad pleading; but in 1712 (10 Anne, c. 14, par. 1) the responsibility for accidental fires in houses⁵ was abolished by the legislature.⁶

5. *Keeping of animals.* — (a) In trespasses of animals by biting or otherwise wounding we find the rule on English soil to be a lineal successor of the form already seen in the North French records,⁷ that the owner "did not know the animal's vice." The three writs in the Register⁸ begin by alleging that the defendant "quòsdam canes ad mordendum oves consuetos apud B. scienter retinuit," "quemdam canem ad mordendos homines consuetum⁹ apud L. scienter retinuit," "quemdam aprum ad percutiendum animalia consuetum apud W. scienter retinuit."¹⁰ Sometimes, especially for dogs, we find a modification of the old rule, the same in

(2) Rolle (Abr. i, pl. 2) thinks the *vi et armis* spoiled the writ; (3) 2 H. IV., *supra*, is unmistakable. For other cases, see (1450) 28 H. VI. 7, pl. 7; (1582) Anon. Cro. El. 10; and also Rolle's Abr. Act. on Case, (B) Fire.

¹ So, also, in *Tuberville v. Stamp*, "The fire in his field is his fire as well as that in his house."

² 1 Salk. 13; Comb. 459; Skinner, 681; Carth. 425.

³ The doubts there expressed because the fire was started in the field, not in the house, arose hardly from the fact that the tradition dealt only with fire in a house (for the writ does not betray this, nor does Germanic tradition), but from the fact that it was started by a servant, and the old rules about absolute responsibility for deeds done in the house and by the household became the source of confusion.

⁴ *Allen v. Stephenson*, 1 Lutw. 36.

⁵ Extended by 14 G. III. c. 78, s. 86; 7 & 8 Vict. c. 87, s. 1, to "estates."

⁶ Blackstone (i. 131) and Lord Lyndhurst (1 Phill. Ch. Cas. 320) misunderstood "accidentally" to include "negligently" in these statutes. This was corrected by *Philliter v. Phippard*, 11 Q. B. 347 (1847); Bacon, Abr. Case, had the right interpretation.

⁷ *Ante*, VII. 327, 328.

⁸ Reg. Brev. 110.

⁹ The writ reads "mordendum" and "consuetos," and the terminations should apparently be exchanged.

¹⁰ Compare Selden Soc., Court Baron, 131 (1320): "[The jurors present] that the said John the Swineherd has a dog which ate a rabbit of the lord . . . And that a dog of the Vicar *often chases* hares in the field (fine 3d.) . . . And that the dog of John Manimester chased a sow of John Albin, so that he lost her pig, to his damage, taxed at 18d., which the Court awards, etc., and John Manimester is in mercy (6d.)." Also p. 52. Here it seems that there was not always an allegation of the *scienter*, or even of the habit, in these lower courts.

idea though somewhat different in form, intimating that liability ensued where the vice and the knowledge could not be shown, if the owner incited the animal to the trespass;¹ *i. e.* the same broad idea, of Command or Assent, as in the case of servants. The rule remained on this basis for several centuries,² though the form of the usual writ seems to have changed slightly.³ By Lord Holt's time it was found desirable to rule that a *scienter* was not necessary in the case of animals "naturally mischievous in their kind;"⁴ and his admirably concise statement of the rule has since prevailed, giving Courts nothing to do but apply it to varying circumstances; though even in this apparently simple task they have sometimes found that they had an elephant on their hands.⁵

(*b*) But for land-trespasses of animals the old strict liability continued in full force. Some indications appear of a tendency to impose a greater penalty for trespasses repeated after a first trespass has occurred;⁶ but no such relaxation seems to have main-

¹ Britton (Nichols' ed.) i. 15: "Let it be inquired . . . [if the killing was] by a beast, whether by a dog or other beast, and whether the beast was set on to do it and encouraged to do such mischief, or not, and by whom, and do of all the circumstances." Fitzh. N. B., Trespass, 89, L. "And if a man do incite or procure his dog to bite any man, he shall have an action of trespass for the same;" following a writ for inciting dogs to bite sheep. In 3 Edw. III. 3, 7 (1330), a bill lays the "incitement" of the dogs to bite the sheep. See also 13 H. VII. 15, pl. 10 (1498).

² Buxendin v. Sharp, 2 Salk. 662 (1697); s. c. Bayntine v. Sharp, 1 Lutw. 36; Smith v. Pelah, 2 Stra. 1264 (1747). In Millen v. Fandrye, the Court seem to have had in mind mainly the land-trespass of the dog (Popham, 161). See *Laws and Liberties of Mass.* (1648), "Sheep" (Whitmore, 191): ". . . If any dog shall kill any sheep, the owner shall either hang such dog or pay double damages for the sheep; and if any dog hath been seen to course or bite sheep before, not being set on, and his owner hath had notice thereof, then he shall both hang his dog and pay for such sheep. . . ." [Re-enacted in General Laws of 1672, s. v.] Probably in England, as here, the claim might always be based either on the habit plus the *scienter*, or merely on an incitement.

³ "Quod retinuit quemdam canem sciens canem predictum ad mordendum oves, consuetum."

⁴ 1700. Mason v. Keeling, 12 Mod. 332, Holt, C. J.: "If they are such as are naturally mischievous in their kind, he shall answer for hurt done by them without any notice; but if they are of a tame nature, there must be notice of the ill quality." The restriction of this rule to "things in which he has no valuable property," and the application of a stricter rule to things in which he has a "valuable property," seems to have been a passing invention of Holt, C. J., in distinguishing the rule as to cattle's trespasses on realty, and has no support in preceding literature. But it may have been inspired, as Mr. Justice Holmes suggests, by the old idea, already noticed, that animals let loose could not bring home responsibility to their former owner. ("The Common Law," 22.)

⁵ Filburn v. People's Palace Co., L. R. 25 Q. B. D. 258 (1890), where an elephant escaped.

⁶ See Laws of Ine, c. 49.

tained itself,¹ and the principle was kept that "a man should so occupy his common that he does no wrong to another man."² In modern times, as we shall see, this rule has been rationalized with others under the principle that those who keep things likely to do mischief keep them at their peril.³ There were but two modifications made. One was the decision, in a solitary case, that in turning the plough on adjoining land (as custom allowed) the owner was not liable for the trespass of the oxen in snatching a mouthful of grass, since "a man cannot at all times govern them as he will;" here the existence of such a custom was held a necessary element in the exemption.⁴ The other was the exemption from trespasses of cattle who wander, when driven along the highway lawfully, provided the driver is present and not in fault and makes fresh pursuit.⁵ This seems at first to have been granted in cases where the plaintiff was bound by custom to fence along the highway.⁶ But in this century this element disappeared, and such a duty now seems to play no part;⁷ and an English Court will now go so far as to exempt the driver (barring negligence) on the highway of the bull who breaks into the traditional china-shop,⁸ — thus

¹ Fitzh. N. B., "Trespass," 87 A; Seld. Soc., Manorial Courts, i. 9: "Hugh Tree is in mercy for his beasts caught in the lord's garden. Pledges, Walter of the Hill and William Slipper. Fine, 6d." Accord., pp. 7, 10, 12, 13, 15, 18, 37, 90, 183; also 114: "one sow and five small pigs of John William's son entered the court-yard of Bartholomew Sweyn and did damage among the leeks and cabbages. . . . Therefore let John make satisfaction to him for the said 2d. and be in mercy for his trespass." These cases date from 1247 to 1294. Add Y. B. 27 Ass. 14, pl. 56 (1354).

² Y. B. 20 Edw. IV., pl. 10 (1481); "Doctor and Student," I. 9 (Muchall's ed., 31) (1518): "Every man is bound to make recompense for such hurt as his beasts shall do in the corn or grass of his neighbour, though he know not that they were there;" under the head of things which are doubtful upon the law of reason. Noy, Maxims, c. 44 (1642), borrows the same language.

³ Blackburn, J., in *Fletcher v. Rylands*, *infra*.

⁴ Y. B. 22 Edw. IV. 8, pl. 24 (1483). But compare also 2 Rolle's Abr. 566 (1618): "If a man has a road along my land for his beasts to pass, and the beasts eat the grass in morsels in passing, this is justifiable;" adding, "this is to be understood as done against his will."

⁵ Y. B. 10 Edw. IV. 7, pl. 19 (1471); Y. B. 15 H. VII. 17. pl. 13 (1502), *semble*; Fitzh., N. B. 128, notes.

⁶ Rastel's Entries, 621, and cases just cited; *Dovaston v. Payne*, 2 H. Bl. 527 (1795). It was always an excuse that the plaintiff was bound, by agreement or by custom, to fence against the defendant; and the modification in question was apparently treated as merely one phase of this, the plaintiff being bound by custom to fence against the highway.

⁷ *Goodwyn v. Cheevely*, 28 L. J. Exch. 298.

⁸ *Tillett v. Ward*, L. R. 100, B. D. 17 (1882).

bringing true the law laid down by Doddridge, J., in 1605,¹ which, however, was probably not good law in his day.² With this history for the rule, it is in appearance strange that it should not have been applied equally to dogs as to other animals. The explanation seems to be that in the Germanic days, from which the traditions come down, the dog was not a domesticated animal, — was only a half-savage hanger-on in the human communities, as he is to-day in many parts of the world. Belonging to nobody, nobody was responsible for him;³ and by the time man's relation to him could be said as a usual thing to be one of control or possession, the tradition was all against making his owner responsible (barring wilfulness) for his trespasses to land. Such seems to have been the judicial attitude up to this century,⁴ and not by any means on grounds of tradition merely; but although Victoria has reached a different result,⁵ and although in this country Dog Acts have dealt decisively with the acts of a dog, the law of England on the subject cannot yet be said to be declared.⁶

6. *Sundry Acts; Acts at Peril.* We have now traced down to modern times the doctrines of Responsibility in the typical classes of acts found expressly regulated in the primitive law; and everywhere there has been more or less rationalization of the rules. In some classes (*e. g.* keeping cattle) the duty is made an absolute one for all in similar situations; in others the question of culpability is reopened as to due care in each case on its circumstances; but in all there has come to be assumed some degree of fault sufficient to amount to culpability. There are, however, numbers of acts not falling under the classes above traced; and the question arises, What has been, historically, the canon of Responsibility with

¹ *Millen v. Fandrye*, Poph. 161: "A man is driving cattle through a town, and one of them goes into another man's house, and he follows them, trespass does not lie for this."

² *Danby and Moyle, JJ.*, in 10 Edw. IV. 7, pl. 19 (1471).

³ Trained hunting-dogs and the like were the exception.

⁴ *Millen v. Fandrye*, Poph. 161 (1605); *Beckwith v. Shordike*, 4 Burr. 2092 (1767); *Brown v. Giles*, 1 C. & P. 118 (1823).

⁵ *Doyle v. Vance*, 6 Vict. L. R. (Law) 87 (1880).

⁶ *Read v. Edwards*, 18 C. B. N. s. 260 (1864).

On the general subject, a comparison of the Colonial law is interesting. (1646. *Laws and Liberties of Mass.*, 1660. Tit. "Cattle," Whitmore's ed. 131.) The common-law rule is changed, and the owner of land must fence it against "great cattle;" but the *scienter* analogy is adopted for the new rule; "nor shall any person knowing, or after due notice given, of any beast of his to be unruly in respect of fences, suffer such beast to go . . . without such shackles or fetters as may restrain and prevent trespass." . . . But "for all harms done by goates there shall be double damages allowed."

reference to these? When did the Courts in these cases begin to base an action upon negligence alone, or upon some other test? We are here brought to the subject of the history of the Action on the Case for Negligence, so-called. But this is an inquiry too complex to be here taken up; a summary reference to its probable history must here suffice. Looking, then, at these sundry injuries (other than the above classes) as the Courts of several centuries ago must be imagined to have approached them, we find that they would probably have presented themselves in one of three aspects: (1) There was as early as the 1600s, and probably earlier, a principle that one who did an unlawful act (or one who committed a trespass) was liable for all the consequential damage, when properly alleged as special damage.¹ (2) The principle *sic utere tuo ut alienum non lædas* was early familiar to the judges, and can clearly be traced even where it is given an English garb.² This was generally employed to cover the case of an injury caused by acts done on one's own land, but it was sometimes extended to cover the case of injuries by cattle. (3) For harm caused by a mere non-feasance, including many cases which we now subsume under Negligence, probably no action would lie.³ The word *negligentia*, as used in earlier times, meant apparently (as has been seen in the action for fire) merely "failure to do" a duty already determined to exist; thus, though the Courts constantly said that "a man is bound to keep his cattle in at his peril," he is sometimes said to be held for "default de bon garde,"⁴ — meaning, not negli-

¹ 1699: *Parkhurst v. Foster*, 1 Ld. Raym. 479. Trespass against a constable for billeting a dragoon upon him, and forcing him to find meat, drink, etc. The jury found that the dragoon was the one who forced the plaintiff, etc. Holt, C. J.: "At common law, if a man does an unlawful act, he shall be answerable for the consequences of it, especially where, as in this case, the act is done with intent that consequential damage shall be done." 1773: *Nares, J.*, and *Gould, J.*, in *Scott v. Shepherd*, 2 Wm. Bl. 893: "Wherever a man does an unlawful act, he is answerable for all the consequences." See also *Courtney v. Collet*, 1 Ld. Raym. 272 (1698); *Reynolds v. Clarke*, 1 Stra. 634 (1722).

² *Brian, J.*, in 20 Edw. IV. 10, pl. 10 (1481): "A man should so occupy his common that he does no wrong to another man." Holt, C. J., in *Tenant v. Goldwin*, 2 Ld. Raym. 1089 (1705): "Every man must so use his own as not to do damage to another;" and also in *Tuberville v. Stamp*, 1 Salk. 13 (1698). *Gibbs, C. J.*, in *Sutton v. Clarke*, 6 Taunt. 29 (1815), approves this argument of counsel: "An individual is bound so to restrain the exercise of his rights over his own land that he may not thereby injure his neighbor."

³ Compare the hesitation in granting assumpsit for a non-feasance.

⁴ 27 Ass. 141, pl. 56. See also the action for keeping a ferocious dog, where "pro defectu curæ" is a part of the declaration, as in *Mason v. Keeling*, 12 Mod. 332.

gent keeping, but merely failure to keep as bound; and the misapprehension of this was probably the source of Blackstone's well-known misstatement that the action was for "negligently keeping" his cattle.¹ It seems, then, that the action on the case based on a mere negligent doing was of little or no consequence until the present century,² and that it then came about partly through the principle of consequential damage noted above, and partly through the growing application of the test of negligence in *Trespass*, as already indicated. But this suggestion is merely one made in passing; the essential point to note is that certain of the cases we have studied historically had become, in the present century, amenable to a generic test of Negligence, or Due Care under the Circumstances, which had somehow come to be applied to other cases also. What we have still to notice is the fate of those scattered classes of cases which never became amenable to this test of Due Care under the Circumstances.

Briefly, they wandered about, unhoused and unshepherded, except for a casual attention, in the pathless fields of jurisprudence, until they were met, some thirty years ago, by the master-mind of Mr. Justice Blackburn, who guided them to the safe fold where they have since rested. In a sentence epochal in its consequences this judge co-ordinated them all in their true category:—

"There does not appear to be any difference in principle between the extent of the duty cast on him who brings cattle on his land to keep them in and the extent of the duty imposed on him who brings on his land water, filth, or stench, or any other thing which will, if it escape, naturally do damage, to prevent their escaping and injuring his neighbor; . . . the duty is the same, and is to keep them in at his peril."³

It is not that the phrase "at peril" was a novel one. On the contrary, it is an indigenous one and a classical one in our law.⁴

¹ III. Comm. 211. Compare the sense of "negligence" in the precedents in Comyn's Dig., Act. on Case for Negligence.

² In *Mitchil v. Alestree* (1677), *e. g.*, the declaration alleged "improvidet et absque debita consideratione ineptitudinis loci;" but this allegation plays little part in the decision (2 Lev., 172, alone has it), and the whole case is approached in a very different way from our negligence cases of to-day.

³ *Fletcher v. Rylands*, L. R. 1 Exch. at 282 (1866).

⁴ Littleton, J., in 10 Edw. IV. 7, pl. 19: "It is at the peril of him who drives;" Doctor and Student, ii. 16 (p. 149): "When a man buyeth land or taketh it of the gift of any other, he taketh it at his peril;" *ib. ii. 27* (pp. 191, 192); *Mitchil v. Alestree*, in 3 Keb. 650: "Per Curiam: It 's at peril of the owner to take strength enough to order them;" keeping gunpowder; action for nuisance; *Holt, C. J.*, in *Anon.*, 12 Mod. 342:

Nor is it that no previous attempt had been made at such a co-ordination of these kindred instances; for several such attempts, of more or less insight and conviction, may be found.¹ What gave the exposition on this occasion its novelty and its permanent success was the broad scope of the principle announced, the strength of conviction of its expounder, and the clearness of his exposition, and perhaps, too, the fact that the time was ripe for its acceptance.² It caught up and reconciled the absolute liabilities already predicated, as well in the two rules just above mentioned (consequential damage of an unlawful act, and "so use your own as not to injure another's") as in the remaining rules for trespasses by acts done "at peril" (keeping cattle, shooting guns under certain circumstances, and others already mentioned); it furnished a general category in which all such rules, whenever formed, could be placed. The full scope of the principle has since not always been perceived in individual instances; and Courts may differ, and have differed, as to whether particular acts (*e. g.* keeping reservoirs) should, in policy, have the principle applied to them.³ But the practical effect of that great jurist's opinion has been to furnish us with three main categories of acts to which Responsibility is affixed with reference to specific harm, viz. (1) acts done wilfully with

"It would be at peril of bulider;" Nares, J., in *Parsons v. Loyd*, 3 Wils. 346: "Every plaintiff sues out process at his peril." Martin, B., had already phrased the same idea in a little different form: (1856) *Blyth v. Waterworks Co.*, 11 Exch. 781, during argument: "I held, in a case tried at Liverpool, in 1853, that if locomotives are sent through the country emitting sparks, the persons doing so incur all the responsibilities of insurers; that they were liable for all the consequences," citing *Lambert v. Bessey*; and in *Fletcher v. Rylands*, 3 H. & C. 793 (lower Court), he speaks of "quasi-insurers."

¹ Holt, C. J., in *Mason v. Keeling*, 12 Mod. 332 (1700), and *Tenant v. Goldwin*, 2 Ld. Raym. 1089 (1705); Cockburn, C. J., in *Vaughan v. T. V. R. Co.*, 5 H. & N. 679 (1850); and counsel in a few prior cases.

² Supplementing Lord Blackburn's judicial utterance, the theoretical exposition of Mr. Justice Holmes, in cc. iii. and iv. of "The Common Law," had served more than anything else to commend and establish the distinction. It has been accepted also by Sir Frederick Pollock, in his "Torts," p. 17 (apparently), and by Mr. Schofield, formerly instructor in Torts in the Harvard Law School, in 1 Harv. Law Rev. at 52.

³ It is sometimes said, for instance, that *Fletcher v. Rylands*, is "not law" in America or in this or that State. But such statements fail to distinguish between (1) the acceptance of Lord Blackburn's principle above, and (2) its application to the facts in *Fletcher v. Rylands*. The principle is sanctioned, in one way or another, consciously or unconsciously, in every court of the country. But (a) it is not invariably held to control in cases having facts like *Fletcher v. Rylands*; and (b) the tendency may perhaps be said to be in many States to restrict to as few as possible the classes of situations to be governed by the principle. An example of the latter attitude is found in the masterly opinion of Mr. Justice Doe, in *Brown v. Collins*, 53 N. H. 442.

reference to that harm; (2) acts done at peril with reference to that harm; (3) acts done negligently with reference to that harm. We had, at the time of the Conquest, two categories only, — acts wilful and acts of misadventure, — and these scarcely distinguishable civilly. To-day, with the process of rationalization nearly accomplished, we find these transmuted to three, — two of them in scope and conscious significance novel to the past: acting at peril, and acting without due care under the circumstances. It has been the effort in these articles to discover and set forth the processes by which our legal ideas, as living conceptions, passed from the one stage to the other.

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APPENDIX.

THE salient parts are here set forth of the precedents and the leading early treatises bearing on the question of negligence and inevitable accident as an element of Responsibility in Battery, etc. The first two precedents make the connection with those already cited from the 1200s in a preceding article.

1330. *Fitzherbert, Abr. Corone*, 354. — "It was found that a man killed an infant by misadventure while he was rolling along a stone which fell upon the infant, etc.; wherefore the justices remanded him to prison to await the grace of the king;" and the sheriff is ordered not to put him into irons.

1330. *Ib., Corone*, 302. — "It was presented that a man killed another by misadventure, scil., he struck him on the head with an arrow [*? sete*] as he was going to a market, and it was adjudged misadventure, and his chattels were forfeit, the town was charged with the [value of the] chattels, and the town was also fined because it did not arrest him."

1400. *Beaulieu v. Finglam*, Y. B. 2 H. IV. 18, 6. — Action for a fire caught from the defendant's fire. Markham, J., puts the case of an accidental fire occurring by the act of a guest or servant: "In this case I shall answer to my neighbor for the damage. . . ." Hull, for defendant: "That will be against all reason to put blame or default in a man where there is none in him; for negligence of his servants cannot be called his feausance." Thirning, C. J.: "If a man kills a man by misfortune, he will forfeit his goods, and he must have his charter of pardon *de grace. Ad quod curia concordat.*" [Here the judge, by his answer, clearly implies that the killer suffers in spite of his being quite blameless; and when the counsel protests that his client will be ruined] Thirning, C. J.: "What is that to us? It is better that he should be undone wholly, than that the law should be changed for him." ["Changed," that is, apparently, so

as to take into consideration any question as to the existence of blame on his part.]

1466. *Y. B. 6 Edw. IV. 7, 18.* — Trespass; the defendant cuts thorns on a hedge, and they fell, *ipso invito*, on the plaintiff's land, and he entered to take them. Catesby, for defendant: "Sir, it has been said that if one does an act, though lawful, whereby wrong and damage is done to another against his will, still if he in any way could have avoided it, etc., then he shall be punished therefor, etc. Sir, it seems to me the other way." . . . Fairfax, for plaintiff: "I say there is a diversity between an act resulting in a felony and one resulting in a trespass, for . . . when it was against his will it was not *animo felonico*, but . . . if one is shooting at butts, and his bow shakes in his hands, and kills a man, *ipso invito*, . . . he shall have a good action of trespass against him, and yet the shooting was lawful, etc., and the wrong which the other received was against his will." Brian, for the plaintiff, puts the cases of a timber falling, and of a blow by a stick in self-defence against a third party, "*me invito*," to which Littleton, J., agrees. Choke, C. J., also agrees, adding: "As to what was said about their falling *ipso invito*, that is no plea, but he ought to show that he could not act in any other way, or that he did all that was in his power to keep them out, etc." [There is nothing to show that this explanation was not agreed in by the other judge; and in *Millen v. Fandrye* it was taken as the reason of the decision. But this case is the first to make such a qualification.]

1506. *Y. B. 21 Henry VII. 27, 5.* — Trespass; the defendant stored the parson's tithes, to save them from the cattle. Rede, C. J.: "Although the defendant's intent [motive] was good, still the intent is not material, though in felony it is; as where one is shooting at butts and kills a man, it is not felony. . . . But when one shooting at butts wounds a man unintentionally, he shall be called a trespasser against his will. And where the executors take the goods of a stranger with those of the testator, they are excusable for the taking in trespass. . . . And in these cases there is reason; for in the first case one cannot *prima facie* know perfectly which goods belong to the testator and which to the stranger. And where one justifies an imprisonment for suspicion of felony, one ought to have good grounds of suspicion. . . . So one ought always to have a good justification." [A clear implication that in his first illustration he regarded the shooter as in some way not without blame.]

1605. *Millen v. Fandrye*, Poph. 161. — Trespass for chasing sheep with a dog; Crew, C. J.: "It seems to me that he might drive the sheep out with the dog, and he could not withdraw his dog when he would in an instant; [then citing the thorn-cutting case] . . . and the opinion was that, notwithstanding this justification, trespass lies, because he did not plead that he did his best endeavor to hinder their falling there; yet this was a hard case. But this case was not like to these cases, for here it was lawful to chase them out of his land, and he did his best endeavor to recall the dog. . . ." Doddridge, J., citing the case of cattle trespassing from the highway: "Trespass doth not lie for this, because it was involuntary, and a trespass ought to be done voluntarily" [showing their idea of "involuntary"]. Jones, J.: "He cannot recall his dog in an instant." [Here "doing one's best endeavor" seems to be accepted as a general excuse.]

1616. *Weaver v. Ward*, Hobart, 134. — Trespass for assault and battery; the defendant pleaded that he and the plaintiff were members of a train-band, and during a skirmish, the defendant, in discharging his piece, *casualiter et per*

infortunium et contra voluntatem suam, wounded the plaintiff, *absque hoc*, etc. Judgment for the defendant. "Felony must be done *animo felonico*, . . . yet in trespass . . . it is not so, . . . and therefore no man shall be excused of a trespass (for this is the nature of an excuse, and not of a justification *prout ei bene licuit*), except it may be judged utterly without his fault; as if a man by force take my hand and strike you, or if here the defendant had said that the plaintiff ran across his piece when it was discharging, or had set forth the case with the circumstances so as it had appeared to the court that it had been inevitable, and that the defendant had committed no negligence to give occasion to the hurt."

1630. *Bac. Maxims*, VII. — "The law doth [in civil trespasses] rather consider the damage of the party wronged, than the malice of him that was the wrong-doer," and so in misadventure, as shooting at butts, "trespass lieth, though it be done against the party's mind and will." [It will be seen that the idea emphasized is the non-necessity of *malice*; the maxim, here and in its after application, was not intended to go so far as to say that the question of due care was immaterial. See the maxim applied to fraudulent knowledge in *Haycroft v. Creasy*, 2 East, at 104.]

1681. *Lambert v. Bessey*, T. Raym. 421. — Trespass for false imprisonment; the defendant justified under a bad writ. "In all civil acts the law doth not so much regard the intent of the actor as the loss and damage of the party suffering," citing the thorn-cutting case, *Gilbert v. Stone*, *Weaver v. Ward*, and the Shooting at Butts, Lifting the Staff, and Timber-falling cases. "And the reason of all these cases is, because he that is damaged ought to be recompensed. But otherwise it is in criminal cases, for there *actus non facit reum, nisi mens sit rea*." [The remarks on Bacon's Maxim, *supra*, apply here. Note that the other three judges exonerated the defendant because he did not know the writ was bad.]

1682. *Dickenson v. Watson*, T. Jones, 205. — Trespass for shooting the plaintiff; plea, that while collecting taxes the defendant, intending to discharge his pistol *ne aliquod damnum eveniret*, and *nemine in opposito visu existente*, against his will shot the plaintiff, who casually crossed the path. Held insufficient; "for in trespass the defendant shall not be excused without unavoidable necessity, which is not shown here. Besides, the defendant did not traverse *absque hoc quod aliter seu alio modo*, as was done in the case of *Weaver and Ward*; and yet judgment there given for the plaintiff."

1700. *Mason v. Keeling*, 12 Mod. 332. — Case for injuries by the bite of a ferocious dog. Counsel for defence argues: "The cases of *Hobart* [*Weaver v. Ward*] and *Jones* [*Dickenson v. Watson*] are not like this, for everybody knows that a gun charged, if it go off, is apt to do mischief, but not so of a dog."

1716. *Hawkins, Pleas of the Crown*, I., c. 28, § 27. — "But it seemeth that a man shall not forfeit such recognizance [to keep the peace] by a hurt done to another merely through negligence or mischance; as where one soldier hurts another by discharging a gun in exercise, without sufficient caution; for notwithstanding such person must, in a civil action, give the other satisfaction for the damage occasioned by his want of care, yet he seems not" to have broken the recognizance. [Here culpable want of care is clearly assumed as the basis.]

1724. *Underwood v. Hewson*, 1 Stra. 596. — "The defendant was uncocking a gun, and the plaintiff standing to see it, it went off and wounded him; and at

the trial it was held that the plaintiff might maintain trespass." [The facts being quite compatible with blame in the defendant.]

1760. *Buller's Nisi Prius*, 16 (6th ed.). — Treating of Assault and Battery, "It is no battery . . . if one soldier hurt another in exercise; but if he plead it, he must set forth the circumstances so as to make it appear to the court that it was inevitable, and that he committed no negligence to give occasion to the hurt; for it is not enough to say, that he did it *casualiter et per infortunium, contra voluntatem suam*, for no man shall be excused a trespass, unless it may be justified entirely without his default [citing *Underwood v. Hewson*] . . . (p. 17). Matter of excuse is an admission of the fact, but saying it was done accidentally, and without any default in the defendant; and that [as I have already said] may be either pleaded or given in evidence on the general issue . . . (p. 25). Every man ought to take reasonable care that he does not injure his neighbor; therefore, wherever a man receives any hurt through the default of another, though the same were not wilful, yet if it be occasioned by negligence or folly the law gives him an action. . . . As in the case mentioned in the third chapter, where the defendant, by uncocking his gun, accidentally wounded the plaintiff, who was standing by to see him do it."

1767. *Beckwith v. Shordike*, 4 Burr. 2092; trespass for the killing of a deer with a dog. Ashton, J., citing *Millen v. Fandrye*, remarked that the court there "held it to be an involuntary [unintentional] trespass, whereas a trespass that may not be justified ought to be done voluntarily . . . [and there] he did his best endeavor to recall the dog. . . . But the present case cannot be considered as an accidental, involuntary trespass." Here Mr. Baron Adams, the trial judge, "had been of the opinion that the jury ought not to have found the defendants guilty, it being an accident that happened without their intention and contrary to their inclination."

1770. *Davis v. Saunders*, 2 Chitty, 639. — The defendant's ship drove against the plaintiff's and trespass was brought. The judgment for the defendant did not explain the grounds fully; but Mansfield for the defendant said: "Here the injury was merely accidental. It is true that even if it had been through negligence, it must have been an action of trespass;" and the reporter understood, as the headnote shows, that "accident" was a defence to an action of trespass.

1773. *Scott v. Shepherd*, 2 Wm. Bl. 892 (the Squib Case). — Blackstone, J. "In strictness of law, trespass would lie against Ryal, the immediate actor in this unhappy business. Both he and Willis [S. threw to W., W. to R., and R. to the plaintiff] have exceeded the bounds of self-defence and not used sufficient circumspection. . . . The throwing it . . . was at least an unnecessary and incautious act. Not even menaces from others are sufficient to justify a trespass against a third person; much less a fear of danger . . . nothing but inevitable necessity: *Weaver v. Ward*, *Dickenson v. Watson*, *Gilbert v. Stone*." [This citation of these cases here indicates that Blackstone, J., regarded the trespasses in them as founded on "unnecessary and incautious" acts.] De Grey, C. J., says: "Actions of trespass will lie for legal acts when they become trespassers by accident; as in the cases cited of cutting thorns," etc. [This, as it stands, seems colorless.]

1773. De Grey, C. J., in *Barker v. Braham*, 3 Wils. 368: "No trespass can be excused but what is inevitable."

1793. *Comyn's Digest* (4th ed.), Battery (A). — "A battery is excused by

inevitable necessity; . . . otherwise if it does not appear to be inevitable and without any neglect in the party," citing *Weaver v. Ward*.

1794. *Ogle v. Barnes*, 8 T. R. 188. — Action for negligently steering a ship against the plaintiff's. Lord Kenyon, C. J.: "It is clear that the mind need not concur in the act that occasions injury to another; if the act occasion an immediate injury to another, trespass is the proper remedy." [This almost assumes, certainly does not negative, the existence of blamable conduct in the defendant.]

1797. *Bacon's Abr. Trespass, I.* — "Special Plea: If at the instant a soldier discharges his gun in exercising, a person runs across and is wounded, the defendant cannot plead in justification of the wounding; and if he plead in excuse thereof, all the circumstances must be shown, that the court may judge whether the wounding was owing to want of caution. *Weaver v. Ward*."

Ib. Trespass (D.). — "If one man have received a corporal injury from the voluntary act of another, an action of trespass lies, provided there was a neglect or want of due caution in the person who did the injury, although there were no design to injure;" citing *Weaver v. Ward*, *Millen v. Fandrye*.

1799 (?). *Espinasse, Nisi Prius*, 3d ed., 313. — "'To constitute an assault the injury should be wilful or proceed from want of care; for if not wilful, and done without default, the action will not lie;' *Weaver v. Ward*. As if a soldier at exercise, by accident, hurts his companion, it is not actionable; but it would be otherwise if it proceeded from neglect or want of due care." P. 383: "To constitute a trespass for which this action is maintainable, the act causing the injury must be voluntary, and with some degree of fault; for if done involuntarily, and without fault, no action of trespass *vi et armis* lies. *Beckwith v. Shordike*. . . . And on the same foundation, though the injury has proceeded from mistake, this action lies; for there is some fault from the neglect and want of proper care; and it must have been done voluntarily. *Basely v. Clarkson*." P. 599, of Case: "It is no excuse for a defendant in this action 'that the injury was involuntary on his part, for if any damage is caused to another, from the folly or want of due care and caution in such defendant, this action lies.'"

1800. *McManus v. Crickett*, 1 East, at 109. — Lord Kenyon, C. J.: "There is no doubt of the servants in those cases ['the servants of a carman through negligence ran over a boy,' etc.] being liable as trespassers, even though they intended no mischief;" citing *Weaver v. Ward*, *Dickenson v. Watson*. [This shows how the statements about intention being immaterial assume the existence of some negligence or like element of culpability. This explains Lord Ellenborough's language in the next case.]

1803. *Leame v. Bray*, 3 East, 593. — Trespass for driving against the plaintiff's chaise. It was claimed that the action should have been Case, the injury being consequential, and "the will not going along with the act." Lord Ellenborough: "If the injurious act be the immediate result of the force originally applied by the defendant, and the plaintiff be injured by it, it is the subject of an action of trespass *vi et armis* by all the cases both ancient and modern. It is immaterial whether the injury be wilful or not. . . . Wilfulness is not necessary to constitute trespass." Grose, J.: "Looking into all the cases from the year book in the 21 H. 7 down to the latest decision on the subject, I find the principle to be, that if the injury be done by the act of the party himself at the time, or he be the immediate cause of it, though it happen accidentally or by misfortune, yet he is answerable in trespass."

1806-8 and 1845. *Selwyn's Nisi Prius*, 1328. — "Although if a person does an injury by an unavoidable accident, an action does not lie, yet if any blame attaches to him, although he be innocent of any intention to injure, . . . then trespass may be maintained."

1808. *Chitty's Pleading*, 128, 129. — "A person may become an immediate trespasser *vi et armis*, even in the performance of a lawful act, if in the course of such performance he be guilty of neglect, as if he hurt another by accident," citing 21 H. VII. and *Lambert v. Bessey*. But "the mind needs not concur in the act that occasions an injury to another, and if the act occasion an immediate injury, trespass is the proper remedy without reference to the intent . . . [citing *Weaver v. Ward*, *Underwood v. Hewson*], and where a person accidentally drives a carriage against that of another, the injury is immediate and trespass is the remedy, though the defendant was no otherwise blamable than in driving on the wrong side of the road on a dark night."

1810. *Milman v. Dolwell*, 2 Camp. 378. — Trespass for cutting away a barge which afterwards sank. Lord Ellenborough held that the cutting away (which was admitted) was a trespass, and that under Not Guilty it could not be shown that the barge was frozen to another which could not be removed separately. "If the necessity was inevitable, and the barges of the third person . . . must otherwise have been destroyed, this might have amounted to a justification."

1810. *Knapp v. Salisbury*, 2 Camp. 500. — Trespass for driving against the plaintiff's horse. An offer to show under "not guilty" that the collision took place "by mere accident and without any default on the part of the defendant," was held to be appropriate only under a plea of justification. "If what happened arose from inevitable accident" is used by Lord Ellenborough as covering the offer.

1823. *Wakeman v. Robinson*, 1 Bing. 213. — Trespass for driving against the defendant's horse. Plea, not guilty. The judge did not direct the jury to consider whether the action was occasioned by any negligence or default on the part of the defendant, or was wholly unavoidable. Dallas, C. J.: "If the accident happened entirely without default on the part of the defendant, or blame imputable to him, the action does not lie; . . . but upon the facts of the case . . . I should have directed the jury that the plaintiff was entitled to a verdict, because the accident was clearly occasioned by the default of the defendant. . . . I am now called upon to grant a new trial, contrary to the justice of the case, upon the ground that the jury were not called upon to consider whether the accident was unavoidable or occasioned by the default of the defendant. . . . The learned judge who presided would have taken the opinion of the jury on that ground, if he had been requested to do so;" and so new trial refused. [Note how "unavoidable," here as elsewhere before and afterwards, is loosely taken as synonymous with "not occasioned by defendant's default."]

1832. *Boss v. Litton*; *Goodman v. Taylor*; 5 C. & P. 407, 410. — Trespass for injuries received by the defendant's horse and carriage. Lord Denman held that in trespass the only defence, as to the defendant's conduct, could be "inevitable accident," = "one which the defendant could not prevent," following *Knapp v. Salisbury*; but this must be pleaded as a justification.

1834. *Pearcy v. Walter*, 6 C. & P. 232. — Trespass for driving against the plaintiff's horse; plea, not guilty. Coleridge, Serjt., for the plaintiff, claimed

that an inquiry into whether there was negligence of the plaintiff or of both, or inevitable accident, could not be gone into under the general issue; implying that it could under a plea of excuse.

1837. In *Cotterill v. Starkey*, 8 C. & P. 691, "inevitable accident" in a case similar to *Boss v. Litton* was taken as equivalent to "not the fault of the defendant," and also equivalent to absence of negligence: Patteson, J. (Q. B.).

1842. *Hall v. Fearnley*, 3 Q. B. 919. — Trespass for driving a cart and horse against the plaintiff; plea, not guilty. Wightman, J., "told the jury that the question for them was, whether the injury was occasioned by unavoidable accident or by the defendant's default." Lord Denman, C. J.: "A defence admitting that the accident resulted from an act of the defendant would not have been so provable [under the general issue]." Wightman, J.: "The act of the defendant was *prima facie* unjustifiable, and required an excuse to be shown. . . . The omission to plead the defence here deprived the defendant of the benefit of it;" and so a new trial.

1849. *Sharrod v. R. Co.*, 4 Exch. at 585. — Parke, B.: "Now the law is well established . . . that whenever the injury done to the plaintiff results from the immediate force of the defendant himself, whether intentionally or not, the plaintiff may bring an action of trespass." [Observe that nothing is said as to possible defences.]

1870. *Smith v. R. Co.*, L. R. 6 C. P. 14. — Blackburn, J.: ". . . If a man fires a gun across a road where he may reasonably anticipate that persons will be passing, and hits some one, he is guilty of negligence, and liable for the injury he has caused; but if he fires in his own wood, where he cannot reasonably anticipate that any one will be, he is not liable to any one whom he shoots; which shows that what a person may reasonably anticipate is important in considering whether he has been negligent."

1875. *Holmes v. Mather*, L. R. 10 Exch. 261. — Action for driving a carriage and horses against the plaintiff. After a citation in argument of some of the above cases, Bramwell, B.: "As to the cases cited, most of them are really decisions on the form of action, whether case or trespass. The result of them is this, and it is intelligible enough: if the act that does an injury is an act of direct force *vi et armis*, trespass is the proper remedy (if there is any remedy), where the act is wrongful, either as being wilful or as being the result of negligence. Where the act is not wrongful for either of these reasons, no action is maintainable, though trespass would be the proper form of action if it were maintainable. That is the effect of the decisions."

1891. *Stanley v. Powell*, [1891] 1 Q. B. D. 86. — Action for firing a gun on a shooting excursion and wounding the plaintiff. The jury found that the defendant had not fired negligently; but it was claimed that trespass nevertheless lay. Denman, J.: "This contention was founded on certain *dicta* which, until considered with reference to those cases in which they are uttered, seem to support that contention; but no decision was quoted, nor do I think any can be found, which goes so far as to hold that, if A. is injured by a shot from a gun fired at a bird by B. an action of trespass will necessarily lie, even though B. is proved to have fired the gun without negligence and without intending to injure the plaintiff or to shoot in his direction. . . . [After reviewing many of the cases above] It was argued that nevertheless, inasmuch as the plaintiff was injured by a shot from the defendant's gun, that was an injury owing to an act of

force committed by the defendant, and therefore an action would lie. I am of the opinion that this is not so. . . . If . . . it is turned into an action of trespass, and the defendant is (as he must be) supposed to have pleaded a plea denying negligence and establishing that the injury was accidental in the sense above explained, the verdict of the jury is equally fatal to the action."

American Precedents.—The notable thing here is that three of our best Chief Justices of the last generation had reached the result here indicated as the correct one, and that expressly as a matter of the construction of the English precedents.

1835. *Vincent v. Stinehour*, 7 Vermont, 62.—Williams, C. J.: "The principle of law which is laid down by all the writers upon this subject, and which is gathered from and confirmed by the whole series of reported cases, is that no one can be made responsible, in an action of trespass, for consequences where he could not have prevented those consequences by prudence and care. . . . We have examined this case more particularly as the highly respectable and learned counsel for the plaintiff . . . has urged . . . that the doctrines to the contrary found in the elementary writers are only the opinions of the writers, and not founded on adjudged or reported cases. The result of our examination is, that we think there must be some blame or want of care and prudence to make a man answerable in trespass."

1843. *Harvey v. Dunlop*, Hill & Den. Suppl. (Lalor) 193.—Trespass for wounding the plaintiff's child: the defendant, a child, had thrown a stone which accidentally struck the other child and put out her eye. Nelson, C. J.: "All the cases concede that an injury arising from inevitable accident, or, which in law and reason is the same thing, from an act that ordinary human care and foresight are unable to guard against, is but the misfortune of the sufferer, and lays no foundation for legal responsibility. . . . If not imputable to the neglect of the party by whom it was done, or to his want of caution, an action of trespass does not lie, although the consequences of a voluntary act," citing Bacon's Abr., *Weaver v. Ward*, *Gibbons v. Pepper*.

1850. *Brown v. Kendall*, 6 Cush. 292.—Shaw, C. J., after referring to *Leame v. Bray*, etc.: "In these discussions, it is frequently stated by judges that when one receives injury from the direct act of another, trespass will lie. But we think this is said in reference to the question whether trespass and not case will lie, assuming that the facts are such that some action will lie. These *dicta* are no authority, we think, for holding that damage received by a direct act of force from another will be sufficient to maintain an action of trespass, whether the act was lawful or unlawful, and neither wilful, intentional, or careless. . . . We think, as the result of all the authorities, the rule is correctly stated by Mr. Greenleaf, that the plaintiff must come prepared with evidence to show either that the intention was unlawful, or that the defendant was in fault; for if the injury was unavoidable, and the conduct of the defendant was free from blame, he will not be liable," citing *Wakeman v. Robinson* and *Davis v. Saunders*.

See, in accord, *Center v. Finney*, 17 Barb. 94 (1852); *Hilliard on Torts*, I. c. V., § 9; *Greenleaf on Evidence*, II., 85; *Morris v. Platt*, 32 Conn. 73 (1865); *Dygart v. Bradley*, 8 Wend. 470 (1832). In *Cole v. Fisher*, 11 Mass. 137 (1814), *Castle v. Duryea*, 2 Keyes, 169 (1865), the contrary attitude may be claimed to exist. In *Brown v. Collins*, 53 N. H. 442 (1873), *Doe, J.*, while appreciating the argument, thinks that *Lambert v. Bessey* is representative of the general trend.

BEFORE THE STATUTE OF FRAUDS, MUST AN
AGREEMENT TO STAND SEISED HAVE BEEN IN
WRITING?

THAT the declaration of a use before the Statute of Frauds need not have been in writing if there was a common-law conveyance, as by feoffment, fine, or recovery, appears to be clear (see Shepp. Touchstone (by Preston), 519); and in 27 Hen. VIII. 8 *b*, the same year in which the Statute of Uses was enacted, there is a discourse upon uses, in which it is said that the land cannot pass without livery, but the use may by bare words.¹ It is asserted by Mr. Washburn (see 2 Wash. R. P. 127-129, 99, 100) and by Mr. Tiedeman (Tiedeman R. P. 2d ed. § 783) that an oral agreement to stand seized was good before the Statute of Frauds; but neither of these authors cites adequate authority for the proposition. It is, of course, to be understood that a technical covenant must have been under seal; and we think that the following discussion will show that the answer which we shall give to the question at the head of this article will depend upon what force and meaning we shall attach to the well-known case of *Callard v. Callard*. The transaction in *Callard v. Callard*, Cro. Eliz. 344 (Queen's Bench), was as follows: A father being seized in fee of certain land, in consideration of a marriage of Eustace, his eldest son, said these words, being upon the land: "Eustace, stand forth. I do here, reserving an estate for my own and my wife's life, give thee these my lands, and Barton to thee and thy heirs." It was held that this was a good conveyance; but upon what grounds does not appear. This decision was reversed in the Exchequer Chamber, reported in Moore, 687. But it appears in the report of Moore that in the Queen's Bench (*supra*) Popham, C. J., held that the consideration of blood raised a use to Eustace without writing; but that the three other judges were of a contrary opinion, and that these latter regarded the transaction as a feoffment with livery being upon the land; and that there was a use to the feoffor and his wife for life, and afterwards to Eustace and his heirs. In the Exchequer Chamber, out of seven judges, five regarded the

¹ See further, 1 Sanders on Uses (5th ed.), 14, 218; 1 Perry on Trusts, § 75, 2d Inst. 675, 676.

transaction as not a good conveyance. The grounds stated in this report (Moore) are that there was no feoffment executed, because the intent was repugnant to law, — that is, to pass an estate to Eustace, reserving a particular estate to himself and his wife ; and that a use it could not be, because the purpose was not to raise a use without an estate executed, but by an estate executed which did not take effect ; and this report states that they all agreed that if this were a use, yet it would not arise upon natural affection without a deed.

In the report of this case in Popham, 47 (there spelt Collard *v.* Collard), it was said by Gawdy, J., of the Queen's Bench (see pp. 47, 48), that "by a bare word an use cannot be raised, as appeareth in diverse reports," citing Mich. 12 and 13 Eliz., which we take to be the case of Page *v.* Moulton, cited *infra*. But then Gawdy, J., added (p. 48) : "But to say generally that an use cannot be raised or charged upon a perfect contract by words upon good consideration cannot be law." And Gawdy, J., goes on to say (p. 48) that it is to be considered what was the law before the Statute of Uses ; and that a use was raised before that statute by a grant of land for money, which is a bargain and sale, and that a grant of land made in consideration of the marriage of the grantor's child is as valuable as a grant of it for money, and more valuable, and that at the common law there was no difference between these ; and that the use by the contract was transferred according to the bargain in each case ; that because of the Statute of Enrolments, which requires a bargain and sale to be by deed indented and enrolled, it appears that before that statute the use would have been passed by bare words ; that that statute applies to bargain and sale only ; hence, that other cases are as they were before the Statute of Enrolments, and that the Statute of Uses has made no change in this particular. But Gawdy, J., repeats that every slight or accidental speech shall not be enough to raise a use ; but that if upon a statement by a man of what he will give upon the marriage of his child, the marriage shall occur, and that in consideration thereof the young people shall have such land, and for such an estate, then a use shall be raised, and shall pass accordingly to the parties ; and Fennor, J., agreed to this. Popham, C. J. (p. 49), also said, that by Baynton's Case, 6 and 7 Eliz., it is admitted that a use was raised at common law by bargain and sale by parol ; for otherwise to what purpose was the Statute of Enrolments ? And that by the same case it is also admitted now to pass

by parol upon a full agreement by words in consideration of marriage or blood, etc. ; that in that case it was also agreed that the consideration of nature is the most forceable consideration which can be, and that a bare covenant by writing without consideration will not change a use ; therefore that the force is in the consideration. (See *infra*, Baynton's Case.) Fennor, J., said (same report, Popham, 47) that the words being spoken on the land amounted to a livery. Gawdy, J., said (p. 47) that the words amounted to a livery if they are sufficient to pass the estate ; but that the words were not sufficient for that purpose, because his intent appeared that Eustace was not to have the land until after the deaths of the grantor and of his wife, and therefore were of the same effect as if he had granted the land to Eustace after his death ; and that it cannot pass as a use, because by bare words a use cannot be raised, etc., as is above set forth in the extract from the opinion of Gawdy, J. Popham, C. J. (same report, p. 49), would seem to regard the words spoken as not to amount to a livery ; and he said that "where land is to pass in possession by estate executed, two things are requisite,—the one the grant of the said land, the other the livery to be made thereupon ;" for that the bare grant without livery is not enough. Clench, J., said (p. 49) that the transaction amounted to a grant and livery also ; and that there was a use in the grantor and wife for their lives.

The report of this case in Popham, in the Queen's Bench, does not therefore agree with the report of what was considered in the Queen's Bench as appearing in Moore, 687 (*supra*), and which is above set forth ; for the report in Popham does not make it appear that the three other judges than Popham, C. J., regarded the transaction as a feoffment to the use of the feoffor, etc., for life, and afterwards to Eustace and his heirs.

Gawdy, J., also on page 48 of this report (Popham) said that by an exception out of the Statute of Enrolments, London is as it was before that statute ; and therefore that lands may pass there by bargain and sale by word without deed. Popham, C. J., also (on p. 49) made the same remark ; and, says the report, to this all the justices agreed. Popham, C. J., cited to this Chibborne's Case, Easter, 6 Eliz., Dyer, 229 *a*, where it was held that such land may pass by bargain and sale by words only.¹

Lord Bacon shows that the mere letter of the Statute of Uses does not prove that an agreement to stand seised may be raised by

¹ See also 2d Inst. 675, 676.

parol.¹ But the arguments of Gawdy, J., and of Popham, C. J., in *Callard v. Callard* (*supra*), do not rest at all upon any phrases of the Statute of Uses, but upon the facts in their arguments mentioned.

In *Corben's Case*, Moore, 544, the father, in consideration of marriage, agreed by parol to stand seised of the land to the use of himself for his life, and afterwards to the use of his son and his heirs. The question was whether this was good. In the Queen's Bench there was a contrariety of opinion among the judges, and it was adjourned to the Exchequer Chamber; and this report says that there it is still pending. This case appears in the Queen's Bench after *Callard v. Callard* in the Queen's Bench. It does not appear at what time *Corben's Case* was adjourned to the Exchequer Chamber; but the decision in the Exchequer Chamber in *Callard v. Callard* was later than the appearance of *Corben's Case* in the Queen's Bench. For aught that appears, it may have been brought to the Exchequer Chamber after the decision of the Exchequer Chamber in *Callard v. Callard*.

Callard v. Callard, as abbreviated in 2 Rolle Abr. 788 (see *infra*, where this is referred to), is followed by a statement referring to *Corben's Case* (*Corbyn and Corbyn*).²

It appears in Rolle, 2 Abr. 784, pl. 4, giving *Corben's Case* (*Corbyn et Corbyn*), that it was held at Michaelmas 37 and 38 Eliz. in the Queen's Bench, that if a man, in consideration of a marriage to be had between B., his son, and A., covenant to stand seised to the use of B. and A., this is a good consideration to raise a use to A. The report of this case in Moore (*supra*) gives the date as Hilary, 36 Eliz. But this statement of Rolle differs as to two beneficiaries instead of one, as is seen by comparison with the above report in Moore; and it does not make any reference to a parol agreement, nor to any future use after the death of the grantor. The question, however, of a future use does not enter into the question here sought to be solved; nor, if the points be identical, is the matter of the number of beneficiaries pertinent to our inquiry.

In Dyer, in a note to *Page v. Moulton* (discussed *infra*), p. 296 b, note, it is said as to *Corbin v. Corbin*, citing 2 Rolle Abr. 784, pl. 4 (*supra*), and Moore, 544 (*supra*), that the point that a use may be

¹ Bacon's Reading upon the Statute of Uses. London ed., 1806, pp. 45, 46, and note 78 on p. 137.

² The copy in the Social Law Library in Boston is torn, so that it does not appear what that statement is; but it would appear to be that the word torn is the word *contra*, and the reference is to *Corbyn and Corbyn*, 37, 38 Eliz. Queen's Bench.

created without deed, upon consideration of natural affection, was not determined; but that it was held by three justices that this is good. This note in Dyer is doubtless error; and the reference is to the three justices in Callard *v.* Callard, as is seen in the report of that case in Popham, 47, above set forth.

As the matter stands as thus far discussed, there does not appear to have been any actual adjudication of the point whether before the Statute of Frauds an oral agreement to stand seised might not have been good. In Callard *v.* Callard, as reported in Moore (*supra*), five of the judges, a majority, in the Exchequer Chamber said that there was no feoffment for the reasons above quoted; and that it could not be a use, because the purpose was not to raise a use without an estate executed, but by an estate executed which did not take effect. This latter means, as we understand it, that there could not be a use because the purpose was not to raise a use without a feoffment with livery of seisin, but by a feoffment which did not take effect in possession. Popham, C. J., in the report of this case in Popham, on p. 49, uses the same phrase "estate executed;" and he says: "Where land is to pass in possession by estate executed, two things are requisite: the one the grant of the said land; the other, the livery to be made thereupon;" for that the bare grant without livery is not enough. Then the report in Moore adds to the foregoing: "And they all agreed that if this were a use, yet it would not arise upon natural affection without a deed." This last expression is a *dictum* merely; because the majority of the court has declared that the purpose was not to raise a future use by mere agreement. The decision in the Exchequer Chamber turns upon *the purpose of the parties* and *the nature of the transaction*, and does not lead to a conclusion that an oral agreement to stand seised of a future use might not, under other circumstances, have been good, or of a use presently to take effect. But even if that expression be regarded as an essential part of the decision, it may well enough follow from the view as to such *hypothetical* purpose of the parties, and the *nature of the transaction*, namely, that where the purpose is to raise a future use by a transaction directly with the *cestui que use*, there must be a *deed*. Here, in any view, the transaction was directly with Eustace. In the theory of the court it was not the purpose to raise a future use in Eustace by mere agreement; but in the opinion of a majority of the court, it was the purpose to raise a present estate in him, with a reservation

of an estate for the lives of the grantor and of his wife. It therefore would seem that the case does not lead to the conclusion that an oral agreement to stand seised of a future use might not, under other circumstances, have been good, or of a use presently to take effect.

In *Pitfield v. Pearce*, Trinity, 15th Charles II., reported in March, 50, there was a deed. It was held that no estate passed, because it did not appear that it was the intention to raise a use; for that by the word "give" it was intended that the transaction should be by transmutation of possession. Twisden says (p. 50) that "in *Callard and Callard's Case*," "the better opinion was that in that case it did amount to a livery, being upon the land," and that there the word "give" was used. But Twisden did not agree that no estate passed in *Pitfield v. Pearce*. He laid stress upon the transaction being upon the land in *Callard v. Callard*; whereas in *Pitfield v. Pearce* it was not upon the land.

The case of *Callard v. Callard* in the Exchequer Chamber is also reported in 2 Anderson, 64, under the name of *Tallarde v. Tallarde*. This report, referring to the case in the Queen's Bench, says that some said that it was a feoffment to the use of the feoffor and his wife during their lives, and afterward to the use of Eustace and his heirs; and some held that it was in the husband and wife by use raised in the husband and wife and afterward to the use of Eustace and his heirs; and this in the Queen's Bench by the judges there. So, whichever way, Eustace had the fee after the death of the husband and wife; and upon this they gave judgment accordingly; upon which a writ of error was brought to the Exchequer Chamber, and the judgment was reversed, — Michaelmas, 38, 39 Eliz. And first they held that no use could be created by these words, nor words only. The words themselves do not so import, for there is not a word of use besides by the father; and his intent does not appear at all to create a use; and by his express words or intent shown, a use could not be created. This report then proceeds to state the case of *Page v. Moulton*, which is given *infra*; and then the report adds: Which case in effect as to a use is the case in question; but if by deed upon good consideration a covenant that another shall have the manor of D. to him and his heirs, this makes a use now as was held M. 1 M., Dyer, fo. 96. The case here referred to is that of *Bainton Petitioner v. The Queen*, Mich. 1. Mary, which is given *infra*. This report, then, proceeds to set forth that they said it could not be a feoffment, because there

were no words, and there was no intent to prove this feoffment nor livery, as this case is ; for it appears by the words that he intended to have the estate to himself and his wife during their two lives, which could not be if he enfeoffed the son, etc.

To avoid repetition, we will not discuss this report in Anderson until later.

Spence says (1 Spence's Eq. Jur. 449) (even using the word "covenant") : "A man, it seems, might covenant to stand seised to an use without deed ;" and in the note he says, "I have assumed that it was first settled that a deed was necessary by Collard v. Collard, 2 Rolle Abr. 788," referring to his page 478 ; and he adds that "Lord Chief Baron Gilbert seems to have considered that a deed was always necessary to raise an use where the possession was not passed." For this reference to Gilbert, see *infra*. In note C. to page 478, Spence says : "At first, parol declarations seem to have been admitted as constituting a covenant to stand seised ; but in the reign of Mary it was decided that there must be a deed as indicative of a settled resolution, Collard v. Collard, 2 Rolle Abr. 788." Collard v. Callard was decided in the reign of Elizabeth, as above. The statement of it in 2 Rolle Abr. 788, cited by Spence (*supra*), is imperfect, as appears from the report of it. In 2 Rolle Abr. 788, a very brief statement is made, and that only as touching a use raised upon natural affection by parol in the nature of a covenant. Spence, relying upon this brief statement, remarks as above ; but as above appears, if the report in Moore be taken, this was a point which the court did not have occasion to decide. If the report in Anderson be taken, the statement therein must be read in connection with the context. It appears in that report that the words used in the transaction were not sufficient to raise a use. To this is added the statement, *which is superfluous*, "nor words only ;" and then, that there was no intent to create a use ; and that by his *express words* a use could not be created. The court, then, according to this report, likened the case to Page v. Moulton (stated *infra*) ; and see that case as understood by Gawdy, J. (referred to above). It does not, from either of these two reports, that of Moore and that of Anderson, appear that the Exchequer Chamber found as they did upon the general ground that a parol agreement to raise a use by standing seised upon good consideration would fail, or that any general rule of law was established in a case of such peculiar facts, consisting, among other

elements, of a transaction *upon the land*, had with the ulterior beneficiary himself, with an estate in possession to remain in the grantor. Finally, if there were no other reason, such diversities appear in the two reports of the case, that of Moore and that of Anderson, that there is no authentic evidence regarding the exact reasons.

The remark of Spence (*supra*), with reference to the reign of Mary, is based upon the following statement in 2 Rolle Abr. 788 (above referred to), and cited by Spence. Rolle says, in his brief statement of Callard *v.* Callard, above referred to, that it is there said (that is, in Callard *v.* Callard) that a case in 1 Mary was in accord. That case in 1 Mary is no doubt the case of Bainton Petitioner *v.* The Queen, Michaelmas, 1 Mary, and reported in Dyer, 96. This case is sometimes cited as Seimors Case. This case is as follows: A., who was attainted, covenanted and granted by *indenture* to B. (in consideration of land already conveyed by B. to A. after the death of B.) to levy a fine of land, to be assured to him, A., for life, remainder to B. in tail. No fine was levied. Held, that no immediate use was raised, for then by no possibility could the covenant ever be performed, and that it is in the future tense; but the report proceeds to say that the court "agreed in a manner, that if I covenant, in consideration of marriage, or for a sum of money paid me, that the party shall have the said manor of D. by express words, this shall change an use immediately, for there is no estate to be made. It was also agreed that if *cestui que use* wills that his feoffees should make estate to J. S. in tail or fee, and die, the use changes before the estate be executed." See further this case cited and stated in Winch, 36. See further this case referred to in 3 Leonard, 75.

Page *v.* Moulton, decided in Michaelmas term, 12th and 13th Eliz., Dyer, 296 *b*, above referred to, was earlier than the decision of Callard *v.* Callard in the Queen's Bench (*supra*). In Page *v.* Moulton, a father upon communication of marriage of his youngest son, promised the friends of the wife that after his death and the death of his own wife, the son should have the land to him and his heirs. The promise was by parol. The marriage took place; "and no consideration on the part of the woman." The report states: "By the opinion of all the four justices of the bench, without open argument, the use is not altered by such naked promise; and so adjudged in next Hilary term." The statement that it was "without open argument," may indicate that the case was only lightly considered.

The above expression, that of the alteration of the use, is a

common expression in the old books ; and other instances of it, or of the equivalent expression, that of the use changing, — meaning changing from the old owner of the legal estate to the new owner of the legal estate, — are to be found in this paper. It is to be explained in this way. Lord Bacon (see Lord Bacon's Reading upon the Statute of Uses, London ed., 1806, pp. 44, 45), speaking of the period of the Statute of Uses, says : " Now, at this time, uses were grown to such a familiarity, as men could not think of possession but in course of use ; and so every man was seised to his own use as well as to the use of others." We have just above, in *Bainton Petitioner v. The Queen*, a double use of the expression ; in one of which it means a change of the legal estate, and in the other a change of the equitable estate ; but very commonly it means a change of the legal estate. The above case of *Page v. Moulton* is cited in *Englefield's Case*, *Trinity*, 32 Eliz., Moore on p. 333, to the point that a use could not arise in the latter case because it was not alleged that the writing was sealed. The case of *Page v. Moulton* has been referred to more than once above ; and it is the case which Gawdy, J., in *Callard v. Callard*, cites to show (as above) that a use cannot be raised by a bare word. Crompton (*Crompton's Jurisdiction of the Courts*, on p. 61) also states *Page v. Moulton* ; and gives as reasons that it is a nude pact, because no consideration moves on the part of the woman, the agreement being by parol ; but Crompton (*ib.*) adds : But I collect that if any consideration had come on the part of the woman, the use would have been changed by this agreement, because there would have been a *quid pro quo*, although it was by parol ; and that Manwood, Chief Baron, said it was adjudged, that if a man said to his son and a woman whom he was to marry, that, in consideration of the same marriage, they should have the same land to them in tail, this is good tail without deed or other circumstance. The son marries, as appears afterward. In a note to the report of *Page v. Moulton* in *Dyer* (as above), *Callard v. Callard* is cited, giving as the reports thereof, Moore, 688, and 2 Anderson, 64, and Popham, 47 ; and in this note it is said that in the Exchequer Chamber in the case of *Callard v. Callard* " by Clerk, Walmsley, Periam, and Anderson, upon a consideration of natural affection an use may be created without deed, and no justices *contra*." This is the same note as that referred to above, in which there is manifest error.

Gilbert (see Gilbert on Uses, 270, 271) says that where the pos-

session was passed, a use could be raised by word ; and he further says : " So it seems a man could not covenant to stand seised to a use without a deed, there being no solemn act ; but yet a bargain and sale by parol has raised a use without, and it has been held to do so since the statute in cities exempted out of the statute." And see above Chibborne's Case. Gilbert also says (pp. 270, 271) that " where a deed was requisite to the passing of the estate itself, it seems it was requisite for the declaration of the uses, as upon a grant of a rent, or the like."

Duke on Charitable Uses, p. 136 (London ed. of 1805), says, speaking of charitable uses under the statute of Elizabeth : " Where the things given may pass without deed, a charitable use may be averred by witnesses ; but where the things cannot pass without a deed, there charitable uses cannot be averred without a deed proving the use." See further 1 Perry on Trusts, § 75.

There are more or less *dicta* to be found in the reports, relying upon Callard *v.* Callard. In Buckley *v.* Simonds, Winch. 35, Mich. 18 Jac. I., Hendon, Sergeant, arguing, said (on p. 37), speaking of Page *v.* Moulton (*supra*), that it was there held that no use was raised, and that the reason was that the " covenant was by words, and not in writing ; but it was not doubted, if this covenant had been by writing, but that the covenant will raise an use ;" and he adds (p. 37), " and so was Callard *v.* Callard's case, 37 Eliz. ; " and that it was ruled that a use did not arise to the son, " because this was by words only ;" but that " it was also agreed that if these words had been by writing they had been sufficient to raise an use to the son." Hendon, Sergeant, also referred to a case in Dyer as Dyer, 232. He probably refers to Constable's Case, Dyer, 101 *b.* But the question there raised was not adjudicated. It does not appear to have been a parol agreement. And in this same case of Buckley *v.* Simonds, later reported in the same report, Winch. 59, Hutton, Justice, arguing, said (p. 60) that it was " resolved in 38 Eliz. in Collard and Collard's Case " that a deed is necessary. This is *dictum*, as in Buckley *v.* Simonds the agreement was by indenture. The case is cited in 1 Siderfin, 26. Hore *v.* Dix, 1 Siderfin on p. 26, Hilary, 12 Charles II. is another case. There was an indenture in this case. The *dictum* is, that it was resolved that a use at this day could not be raised without deed, and to prove this *vide* Callard and Callard's Case, 1 Rep. 75 *a*, 12 Eliz. Dyer, 296 *b.* This last reference is to the note in Dyer. In Foster *v.* Foster, 1

Siderfin, 82, 14 Charles II. King's Bench, there was *a deed* by a mother to her eldest son. It was held that it could not take effect as a bargain and sale because not enrolled; and that it could not operate at common law because there was no ceremony; and that it could not operate by way of use because upon the face of the deed it appeared that such was not the intent of the parties.

Pitfield *v.* Pierce's case, Hill. 11 Car. II. in this court was cited, which was, says the report of Siderfin above, in effect: I give and grant to my son and to the heirs of his body, to have and to hold after my death, and adjudged that no use arose. See Pitfield *v.* Pearce, Trinity 15th Car. II. *supra*. And the report of Siderfin proceeds as follows: And it was affirmed by Twisden, Justice, and not denied by any one, that although *a deed* operate by way of use or otherwise, yet no particular estate can be reserved to the person who parts with the estate. And for this cause also it was held that the deed to the eldest son was void, — that is to say, because in this deed there was a clause; she, the said Margaret Foster, enjoying it during her life. And *if the case of* Callard, 1 Rep. 75, had been by deed, yet they held that no use would have arisen, because it is reserving an estate to me and my wife, which could not be; and therefore the whole operation of the deed is for this reason hindered and obstructed. 38 Hen. VI. 38. Also the court was of the opinion, according to the case of Callard, that no use would arise without deed, as they of the Common Bench held before, p. 26. *For this see supra* Hore *v.* Dix, 1 Siderfin, 26.

The report adds, *vide* 12 Eliz. Dyer, 296 *b* (which is Page *v.* Moulton, *supra*).

This case of Foster *v.* Foster is also reported in Sir Thos. Raymond's Rep. 43, King's Bench. This report contains arguments of counsel, and the mere finding of the court for the plaintiff.

In the foregoing cases there was *a deed*; and the statements are merely *dicta*.

The language of Holt, C. J., in Jones *v.* Morley, 1 Lord Raymond, 290, is also but *dictum*. The expression is: "Consideration of blood will not raise a use without deed," citing Callard *v.* Callard, Moore, 687.

See same case, Holt's Rep. 321.

In Roe *v.* Tranmer, 2 Wilson, 78, Willes, C. J., said (p. 78) that everything was present to make a good covenant to stand seised; and mentioned, among other elements, that there was a deed. This was in Trinity term, 30 and 31 Geo. II.

3 Com. Dig. 286 declares that a covenant to stand seised "ought to be by deed ; for an use shall not be raised by parol." As *contra*, Comyn here cites Plowd. 303 *a*, which is a part of an argument for the defendants. The case is that of *Sharington v. Strotton*, for which see *infra*. Comyn also cites *Callard v. Callard* in the Q. B. He further cites *Callard v. Callard* in Moore, and in Popham ; Page *v. Moulton* in Dyer ; *Callard v. Callard* in Rolle Abr. ; *Hore v. Dix* in Siderfin ; and *Foster v. Foster* in Siderfin ; for all of which see *supra*. He also cites 1 Ventris, 140. This case is *Crossing v. Scudamore*, 1 Ventris, 137. Counsel arguing (p. 140) says that a deed is necessary to raise a use by way of covenant, citing *Callard v. Callard* in 3 Cro. (Eliz. 344), and in Popham's Rep. ; and he adds "and hath been often resolved since."

Sharington v. Strotton, Plowd. 298, also cited as *Baynton's Case*, also as *Bainton's Case*, was a case in the Queen's Bench, 7 and 8 Eliz. The transaction was upheld as a good deed, being a covenant to stand seised.

Crompton's jurisdiction of the courts is as follows, on page 60: A man by parol, without writing, and without livery of seisin, grants to A. B. land, *pro consilio suo impedendo*, the grantee shall have *sub-pæna*, for there is a good consideration to change the use before the statute ; and so it is to change the possession to this day ; for the said statute speaks of bargain and sale only. *Vide* Com. fol. 301. This reference is to *Sharington v. Strotton* (*supra*), Plowden, 301, argument of counsel. Crompton then proceeds (*ib.*) : If I promise and agree with another that if he will marry my daughter, that afterwards they shall have my land, and he does this, they have a use in my land, and I shall be seised to their use, for the thing is done by which I am benefited, etc. (citing Fleetewood and Wray, counsel in *Bainton's Case*) (see *supra*) ; and the Statute of Uses made in 27 Hen. VIII. ch. 10 says where any one is or shall be seised to the use of another by reason of any bargain, sale, feoffment, fine, recovery, covenant, contract, agreement, will, or otherwise, by any means whatever, the *cestui que use* shall have the land as he had the use, etc. So by the intent of the makers of the statute, a man would be seised by bargain and sale, covenant or agreement, and this is to be understood by money or other good consideration, citing Com. 304. The above reference is to arguments of counsel in *Sharington v. Strotton* (*supra*), one of whom was Plowden himself, then an apprentice of the Middle Temple.

In respect to *the mere words* of the Statute of Uses, as *not* effectual to prove that an agreement to stand seised may be raised by parol, see the argument of Lord Bacon, referred to *supra*.

Crompton then proceeds, on p. 61 : And it seems that any consideration which is good and reasonable, and where there is a *quid pro quo*, is sufficient to change the use to this day ; and the statute transfers the possession to the use. He here excepts bargain and sale as excepted by the Statute (of Enrolments), citing as above arguments of counsel in the above case in Plowden. Crompton further says (p. 61) : A man by parol, without deed, GRANTS to his son and his wife in tail such land in consideration of said marriage ; and it was agreed by all the justices that the use changed upon said consideration without writing, and after marriage, as at the assizes at Stafford, in the case of Babington, Manwood, Chief Baron of the Exchequer, said. See another reference to another statement of Crompton, *supra*.

Sheppard's Touchstone, 508, by Preston, is as follows,—the following parts in brackets [] are the words of Preston : That there is no need that a covenant to stand seised should be "by deed indented, etc., or that the deed be enrolled ; for uses [except on a bargain and sale, under the Statute of Enrolment] may be raised by deed poll as well as by deed indented. Also uses may be created, as some hold [and truly], by word or parol agreement, as well as by deed or writing ; for it is said it hath been adjudged [but the proposition is not law] that if a man SAY TO HIS SON and a woman that his son is to marry, that, in consideration of the same marriage, they shall have the land to them two in tail, that hereby a good estate tail will arise after the marriage ; and that where one doth by word without deed GRANT TO HIS SON and to his wife in tail land in consideration of their marriage, that it was agreed by all the judges that the use did arise upon this agreement. Howsoever, it is most safe in these cases to do it by deed and in writing ; for Dyer, 296, Plowd. 22, seem to oppugn this."

In a foot-note it is said : " See Stat. 29 Charles II., ch. 3, which makes a writing necessary." Of course the Statute of Frauds, here alluded to, only goes to the question of a writing, and does not touch the question here considered as to the necessity of a deed ; for if any writing was necessary before the Statute of Frauds, in an agreement to stand seised, it was a deed. The marginal note reads as follows : Crompton's Jurisdiction, 61, 60 (for which see *supra*) ; Plowden, 301, 308 (which is *Sharington v. Strotton*, *supra*) ; " and the better opinion

of the judges in Corben's Case, 38 Eliz." (for which see *supra*); Dyer, 296 (this is Page *v.* Moulton, above); Plowd. 22, is Colthirst *v.* Bejusin. There is nothing pertinent on p. 22; but counsel, in arguing that case, says, on p. 25, that it is requisite that conveyances of things should be certain; for which reason the law has ordained certain ceremonies to be used, and especially in the case of freeholds.

The above statement of Mr. Preston that "the proposition is not law," would seem to apply to the first proposition, namely, "that if a man SAY to his son," etc. It would seem that Mr. Preston expresses no opinion concerning the other and later proposition, namely, that if one makes A GRANT BY WORDS, etc. As to these two distinct propositions, see the extracts from Crompton given above.

As to the above reports of Callard *v.* Callard, as found in Croke's Eliz. (*supra*), Moore (*supra*), Popham (*supra*), Anderson (*supra*), and Rolle's Abr. (*supra*); these are the only books containing a report of that case; and see further to this "Repertorium Juridicum" (London ed., 1742), and Tomlin's "Repertorium Juridicum," under the name of this case.

In conclusion, it seems to us that the decision in Callard *v.* Callard, taken most strongly, went no further than to hold that the transaction in that case did not constitute an agreement to stand seised: that it was a transaction which amounted to nothing whatever, taking place on the land, and the grantor not passing the immediate possession, but reserving a present life estate, etc.; that it does not appear that the Exchequer Chamber found as they did, upon the general ground that a parol agreement to raise a use by standing seised upon good consideration would fail; that it has never been decided, in any case or class of cases, that under the Statute of Uses and the law of uses every agreement to stand seised must of necessity be by deed, — that is, that no agreement to stand seised is good without deed; that judicial legislation, which any such doctrine (as that such an agreement must be by deed) would be, is not to be inferred without clear adjudication; that the reports of Callard *v.* Callard, in the Exchequer Chamber, are on this point so diverse as to leave us without authentic evidence of the exact reasons; that the arguments of Gawdy, J., and Popham, C. J., are unanswerable, and have not been met; that the *dicta* in the books based upon these reports of Callard *v.* Callard do not show us what Callard *v.* Callard decided in this particular, and are no stronger than the reports of Callard *v.* Callard themselves.

Frank Goodwin.

ENGLISH LEGAL LEGISLATION IN 1893.

ENGLISH legislation in 1893 has been somewhat scanty, so far as the interests of lawyers are concerned. The reasons for this fortunately do not fall within the scope of this paper, which simply purports to be a brief review of what has been effected.

The first statute that demands notice is cap. 7, The Customs and Inland Revenue Act, 1893. This increases the *6d.* duty on contract notes to a shilling, and abolishes the "delivery duty" on marketable securities transferable by delivery. Under the Stamp Act, 1891, a duty of 1s. per £100 was charged on the first delivery of such securities in any year, but the payment of this duty was found so exceedingly inconvenient in practice that its abolition will be generally welcomed.

Passing on to cap. 21, The Voluntary Conveyances Act, 1893, an enactment is found declaring that no voluntary conveyance of lands, whether made before or after the passing of the act, if in fact made *bonâ fide* and without any fraudulent intent, shall hereafter be deemed fraudulent or covinous within the meaning of the Act, 27 Eliz. c. 4, by reason of any subsequent purchase for value, or be defeated under any such purchase. There is, however, an express exception of any of the provisions of the said Act by a conveyance made upon cases where the author of a voluntary conveyance has, before the passing of the Act, made a disposition in favor of a purchaser for value. It will be remembered that the Act, 27 Eliz. c. 4, was really directed against fraudulent, feigned, and covinous conveyances, but the ingenuity of the judicial bench succeeded in holding that the mere fact of a subsequent sale for value by the original vendor was in itself sufficient evidence of fraud in the previous conveyance to avoid it within the Act. For some time at least, students and practitioners will still have to refer to the decisions on the Act of Elizabeth, which are conveniently collected in the notes to *Ellison v. Ellison*, 1 W. & T. 334 to 342, 6th ed. The former danger in conveyancing was that the voluntary settlement which the purchaser for value proposed to ignore or defeat had really been rendered valid by a subsequent valuable consideration. The present danger, if any, will arise from the suppression of voluntary conveyances. It is said that a volunteer, unlike a purchaser, does not, and indeed

cannot very well insist on the delivery of the deeds, and his grantor, if so minded, can purport to make a subsequent conveyance of the same property, suppressing the voluntary conveyance. This is a danger which no amount of care in the investigation of the title can be trusted to avoid, and the only remedy would seem to be the compulsory registration of all voluntary conveyances.

The next statute, cap. 22, The Appeal (*Formâ Pauperis*) Act, 1895, will put a stop to many pauper appeals to the House of Lords. An incidental petition for leave to sue *in formâ pauperis* is necessary under the present practice, and the present Act provides that if the House, on the report of its appeal committee, determines that there is no *primâ facie* case for the appeal, the House may refuse the prayer of the petition for leave to sue. This will nip many such appeals in the bud. As a pauper has everything to gain and nothing to lose by appealing, and will therefore naturally appeal however hopeless his case, the new check ought to prove highly beneficial.

Cap. 30. The Friendly Societies Act, 1893, is intended to protect sect. 22 of the Friendly Societies Act, 1875, from the operation of the Arbitration Act, 1889. Friendly Society disputes are settled in the manner provided by sect. 22 aforesaid, and the present Act provides that the court or person to whom the dispute is referred shall not be compelled to state a special case on any question of law arising in the case, but may do so on request of either party, the object being as far as possible to leave the Friendly Society forum untouched.

Cap. 32. The Barbed Wire Act, 1893, provides a summary procedure for the removal of barbed wire fencing where it is a nuisance to a highway. Judging from the extract from Mr. La Monte's paper on the subject in the New Jersey Law Review (see 95 L. T. 419), this subject has received a considerable amount of attention in the American courts, and the Act is therefore noticed here.

Cap. 39. The Industrial and Provident Societies Act, 1893, is scarcely of sufficient general interest to be analyzed. The effect, shortly, is to re-enact and amend the Industrial and Provident Societies Act, 1876. As in the case of Friendly Societies, the forum appointed by the Act for the settlement of disputes (sect. 49) is not bound under the Arbitration Act, 1889, to state a special case on any question of law, but may do so at the request of either party.

Cap. 53. The Trustee Act, 1893, consolidates the provisions

of various enactments relating to trustees. A reference to the schedule to the Act will show among what a multitude of Acts these provisions have hitherto lain scattered. The old law has, however, been well understood, and for some time at least difficulties may arise from the difference of wording between the old and new provisions. It will be noticed that sect. 1 incorporates the decision of *Hume v. Lopes*, 1892, App. Cas. 112, deciding that "trust funds in his hands," in the Trust Investment Act, 1889, included all trust funds in the trustee's hands whether at the time in a state of investment or not. Sect. 21 extends sect. 37 of the Conveyancing Act, 1881, to administrators providing that "An executor or administrator may pay or allow any debt or claim on any evidence that he thinks sufficient." It was considered, by analogy to *Re Clay & Tetley*, 16 Ch. D. 3, that the former section did not apply to administrators. On the other hand, sect. 22, allowing the survivors of two or more trustees to execute a power, seems narrower than sect. 38 of the Conveyancing Act, which applied to two or more *executors or* trustees. This point, however, is probably met by sect. 50, which makes the word "trust" include the duties incident to the office of personal representative of a deceased person. The Act was intended to be a mere Consolidation Act, and on the whole it has apparently made no appreciable change in the law.

Cap. 57. The Law of Commons Amendment Act, 1893, renders the consent of the Board of Agriculture necessary before any inclosure or approvement of any part of a common can be made under the Statute of Merton, 20 Hen. 3, c. 4, or the Statute of Westminster, the second, 13 Ed. 1, St. 1, c. 46. It will be remembered that under these statutes, which were only declaratory of the common law, the lord of a manor could inclose part of a common of pasture, provided he left sufficient for the commoners, the onus of proving such sufficiency being on the lord. This right of approvement was confined to common of pasture. In giving or withholding their consent to the inclosure, the Board are to have regard to the same considerations and, if necessary, hold the same inquiries, as on an application for inclosure under the Commons Act, 1876. The latter Act provides for the fullest consideration of and inquiries as to the benefit of the neighborhood and the protection of private interests, including the commoners' rights, and the present Act will no doubt render almost impossible quiet inclosures by wealthy lords against poor commoners, who dare not and cannot afford to resist.

Cap. 58. The Companies (Winding-up) Act, 1893, merely enacts that an order for payment of money made by the court, under the Companies (Winding-up) Act, 1890, sect. 10, shall be deemed to be a final judgment within the meaning of the Bankruptcy Act, 1883, sect. 4 (1) (g). The Companies (Winding-up) Act, 1890, sect. 10, gave the court power to order delinquent directors, officers, or promoters to repay any moneys or restore any property misapplied or retained by them, or contribute a sum of money to the assets by way of compensation. The order is made on the application of the official receiver or liquidator, or of any creditor or contributory, and, if it is not obeyed, a bankruptcy notice may now be served on the defaulter, requiring him to obey the order. Non-compliance with the terms of this notice, within seven days after service, constitutes an act of bankruptcy.

Cap. 63. The Married Women's Property Act, 1893, amends the Married Women's Property Act, 1882, in several important particulars. A creditor suing a married woman on a contract, under the Act of 1882, had to allege and prove that she was possessed of separate estate at the time of making the contract. *Palliser v. Gurney*, 19 Q. B. D. 519; *Tetley v. Griffith*, 57 L. T. 673. Under sect. 1 (a), this difficulty, which often worked great injustice in practice, is removed. Sect. 1 (b) makes no alteration, and, as before, the contract once binding will bind after-acquired separate property. Separate property, however, did not include property acquired during widowhood (*Pelton v. Harrison*, 1891, 2 Q. B. 426), and, therefore, sect. 1 (c) provides that the contract shall be enforceable against such property. As before, the contract cannot be enforced against property subject to a restraint on anticipation. Costs, however, may now be ordered, under sect. 2, to be paid out of such property, in the case of an action instituted by a married woman, or by a next friend on her behalf. This alters the law as laid down in *Cox v. Bennett*, 1891, 1 Ch. 617, and *Re Glanvill*, 31 Ch. D. 522. Sect. 3 provides that sect. 24 of the Wills Act, 1837 (making a will speak from the testator's death with reference to the property comprised therein) shall apply to the will of a married woman made during coverture, whether she is or is not possessed of or entitled to any separate property at the time of making it, and such will shall not require to be re-executed or republished after the death of her husband. Hitherto such a will passed separate estate even where the married woman had none at the date

of the will (*Charlemont v. Spencer*, 11 L. R. Ir. 490; *Re Bowen*, 1892, 2 Ch. 291), but it did not without re-execution pass property acquired after the death of her husband. See *Willock v. Noble*, L. R. 7 H. L. 580; *Re Price*, 28 Ch. D. 709, and the notes to sect. 8 of the Wills Act, in *Shelford's Real Property Statutes*, 9th ed., by T. H. Carson, Esq.

The New Rules of November, 1893, may be shortly noticed. Order XI., as to service out of the jurisdiction, was extended to torts, originating summonses, notices of motion in patent cases, summonses, orders, and notices in winding up companies, and petitions for administration, execution of trusts, or for orders dealing with funds in court. This order has been annulled by the Rule Committee to give the Scotch members an opportunity of considering it. In the summary procedure under Order XIV., a judge giving leave to defend may order the action to be set down for trial at once, and a special list is to be kept of cases in which such judge thinks a prolonged trial will not be requisite, the judge being empowered to order any cause to be put into that list. In practice leave to defend is always given where there is any probability of a real defence. Trustees may now represent beneficiaries in foreclosure actions. Powers are given to approve a compromise in the absence of some of the parties interested, and to appoint a person to represent absent heirs, next of kin, or members of a class. A plaintiff may proceed to trial without pleadings if he endorses his claim sufficiently on his writ, and states his intention of proceeding without pleadings.

The defendant may, however, apply for a statement of claim or particulars. If the trial proceeds without pleadings, all defences are open to the defendant, but he must give notice if he intends to rely on a set-off or counterclaim, or on the defence of infancy, coverture, fraud, statute of limitations, or discharge under the Bankruptcy Acts. The fact that money has been paid into court is not to be communicated to the jury or taken into account by them in finding the amount of the debt or damages. There are to be no interrogatories (even in cases of fraud or breach of trust) without the leave of the judge to whom the proposed interrogatories must be submitted. Discovery or inspection of documents is not to be ordered if not necessary to fairly dispose of the cause or matter, or to save costs. Verified copies instead of originals may be ordered to be inspected. The whole order as to discovery is now to apply

to infant plaintiffs and defendants, and to their next friends and guardians *ad litem*. Undue delay in proceedings is to be checked by the Chief Clerk, whose duty is to report it to the judge. Costs of an unsuccessful claim or resistance to any claim to any property are not to be paid out of the estate unless the judge so directs, and the costs of ascertaining the person entitled to any legacy, money, or share, are *prima facie* to be paid out of such share, *i.e.*, not out of the whole estate. Probably if the difficulty arose simply from the language of a testator, costs would be allowed out of the general estate; but it is yet too early for a judicial decision on the point. Where some of the persons entitled to shares are ascertained, their shares may be paid at once without reserving any part to answer the costs of ascertaining the persons entitled to the remaining shares. Lastly, the time for appealing is reduced, in the case of interlocutory orders, or final or interlocutory orders in any matter not being an action from twenty-one to fourteen days, and in other cases from one year to three months. Speed, cheapness, and finality seem to be the chief objects aimed at, but time alone can show how far these objects have been attained.

G. Rowland Alston.

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THE LAW SCHOOL. — The present efficiency of the school library gives interest and value, for purposes of comparison, to the following account of its early accessions and growth, for which we are indebted to the Librarian.

In the very interesting preface to the first edition of the catalogue of the library of the Law School, published in 1833, and edited by Charles Sumner, then a student in the school, reference is made to the catalogue of the library of the university, published in 1723, which, he says, enables us to see the extent of this collection, and what portion of it is related to law. The whole number of volumes of the common law in that catalogue is seven; namely, Spelman's Glossary, Pulton's Statutes, Keble's Statutes, Coke's First and Second Institutes, and a couple of volumes of the Year Books.

Mr. Sumner then proceeds to sketch the establishment and growth of legal education, particularly in the university, and, in connection with such growth, the rapid increase of the collection of legal works. He mentions the chief benefactors of the library, — Hollis, Gardiner, Gore, Story, and Livermore, — and describes a few of the most valuable and important works embraced among the books thus acquired. The law library at this time (1833) contained about 3100 volumes.

Shortly after the catalogue was prepared, the library was enriched by the bequest of Samuel Livermore, Esq., of his entire library of works on Roman, Spanish, and French law. The number of volumes in this collection was about 450.

It should be mentioned that, previous to 1832, when Dane Hall was built, the Law School occupied two rooms in College House. One was the private room of Judge Story and contained his library; the other was the lecture-room, and was also used by the students as a reading-room. The university at this time possessed but few works on the law, and most of these were kept in the general library, and not in the Law School.

Soon after Judge Story's appointment the corporation purchased his library consisting of over 1,000 volumes, the students having been kindly permitted the use of his books previous to such purchase. The books thus obtained, with the few works on law previously mentioned, formed the nucleus from which the law library as a separate collection has grown; the 3,100 volumes of 1833 having increased to more than ten times that number in 1893.

ANNUAL REPORT OF THE ATTORNEY-GENERAL OF MASSACHUSETTS. — CORRECTION. Last month the REVIEW adopted the Attorney-General's statement that *Com. v. Trefethen* was the first case where a capital conviction had been reversed in Massachusetts. It now appears that in *Com. v. Hardy*, 2 Mass. 303, a capital conviction secured before Supreme Court sitting *in banc* was reversed by them, and upon a second trial the prisoner was acquitted. So *Com. v. Trefethen* is at least not the first case.

COUNSEL AND COURT. — It has often been regretted that American methods of reporting do not reach the colloquy between judges and counsel in the course of the argument. Lately, in England, a manufacturer who had bought belting for his machinery "warranted for ten years," insisted upon using it after it was useless, and in order to sue each year for the accruing damages. When his counsel appeared in court to press this claim the following dialogue took place:—

Lord Coleridge: "And you actually insist that your client, the plaintiff, may go on using a thing which he says is of no use, not for the purpose of using it, but for the purpose of bringing repeated actions for his not being able to use it; and that, too, notwithstanding an offer to take it back and return the money?" *Chitty* (for the plaintiff): "Yes, that is our claim." *Lord Coleridge*: "Then we will try if the law will not enable us to resist it." *Chitty*: "This is not a court of morals but a court of law." *Lord Coleridge*: "True, and what is morality is not always law; but the law ought to be in accordance with morality; and we will try and see if it be not so here. . . ." (10 Times Law Reports, 225.) And the court dismissed the claim. Surely no opinion sent down in cold writing, after the argument, could so effectually dispose of the idea that there is any right to heap up damages for others to pay, unless, as in *Shylock's* case, it is "so nominated in the bond," and, perhaps, — as in *Shylock's* case, — not then.

THE REFERENDUM. — That provision of the Constitution of Massachusetts which enables the Legislature to consult the Supreme Court upon judicial questions of importance has recently been put in use to obtain opinions upon what is known as the referendum. The Legislature asked whether it was constitutional to provide that an act (one granting suffrage to women) should take effect (1) throughout the Commonwealth, (2) in cities and towns, upon acceptance by voters; and also whether it could provide that women specially registered might vote upon the first question. The bare majority answered in the negative, Knowlton, J., with them on the first and third questions; Holmes and Barker, JJ., dissenting altogether. The majority base their answer upon the theory that

the Legislature is the agent of the people for the purposes of law making; that this would be in effect shifting the burden of responsibility which the Constitution meant to fix on it, and giving to the people the ultimate legislative authority definitely surrendered by them at the time of the adoption of the Constitution.

The difference between the majority and Mr. Justice Holmes, whose opinion is the most suggestive among those of the minority, seems to be double, lying partly in the different tests of constitutionality adopted, and partly in the question whether or no such acceptance by the people is legislation. While the majority, on the one hand, reject the idea as one not contemplated by the Constitution, Mr. Justice Holmes, on the other, accepts it as one not forbidden. The majority say that the actual enacting legislative force is the vote of the people. Mr. Justice Holmes points out that if such a law "does go into effect, it does so by the express enactment of the legislative body." He agrees that the people may not legislate without an amendment of the Constitution, but does not accept the conclusion that the enactment of laws may not be made to depend on their consent.

It would seem that his may be considered the sounder view. The analogy is stronger to a law which depends, as one may, upon the happening of a future event, or to an agent going back to his principals for instructions and yet performing the duties of his agency himself, than it is to a judge turning cases over to his private secretary for decision, or a governor giving his clerk the power to pardon. And it does not seem a dangerous or unwise use of legislative authority; or, indeed, an arrangement which would have been looked upon by the founders of the Constitution as improper or inexpedient.

"FLOATABLE STREAMS"—COMMERCIAL POWER OF CONGRESS. — In *Gwaltney v. Scottish Lumber Co.*, 16 S. E. Rep. 692, there is an interesting discussion by the Supreme Court of South Carolina of the public rights over running streams, though the actual decision turned on a point of small importance. The court lay down the doctrine that, in addition to the generally recognized class of navigable waters, there exists another kind of streams over which the public have rights. These the court call "floatable streams," which, while not navigable by vessels or even smaller craft, are yet of use to the public "in bearing the products of mines, forest, and tillage of the country they traverse to mills and markets." Such streams are public highways, and the rights of the riparian proprietors are subject to an easement in favor of their free use for those purposes to which they are adapted.

The rule here stated is supported by a number of decisions (*Lancey v. Clifford*, 54 Me. 487; *Buchanan v. Grand River, etc. Co.*, 48 Mich. 364; *Shaw v. Oswego Iron Co.*, 10 Oregon, 371), which, while varying more or less as to where the line should be drawn between the concurrent rights of the public and the riparian proprietors, all recognize these streams not technically navigable, but navigable for logs, as public highways. *Gould on Waters*, 2d ed. sec. 107.

The inherent reasonableness of this doctrine makes it probable that it would be generally followed; and this suggests a possible application of that tremendous piece of machinery, the commercial power of Congress. It has indeed been hitherto generally assumed that the jurisdiction of

Congress only extended to strictly navigable waters, and that when it was impossible, from natural or artificial causes, for ships or boats to go upon a stream, the jurisdiction of Congress did not cover it. *Com. v. King*, 150 Mass. 221. But if floatable streams are public highways, they may well be, and often are, highways over which passes interstate and foreign commerce, and as much subject to the control of Congress as railways, canals, or telegraph lines. Doubtless, until Congress does legislate, the States may do so, and require men floating logs or other produce to obey such regulations as are necessary for the public good. A State has as good a right to enact that logs shall only be floated in rafts (*Harrigan v. Conn. River Lumber Co.*, 129 Mass. 580) as to require all locomotive engineers to be examined for color-blindness. *Nashua, etc. R. R. v. Ala.*, 128 U. S. 96. But if Congress chose to make a general law for the government of floatable streams in so far as they are channels for interstate and foreign commerce, it would seem there would be very little doubt of its constitutionality. There is here another instance of the great scope of the power to regulate commerce vested in the national government, a power which, if the people once get the idea of using it to attain their ends, will extend in a hundred directions beyond what has hitherto been dreamed of.

LIQUOR SALOON A NUISANCE *per se*. — Another restriction has been placed upon the liquor traffic by the decision of the Indiana Supreme Court, in the recent case of *Haggard v. Stehlin*, 35 N. E. Rep. 997, to the effect that a duly licensed and properly conducted liquor saloon is a nuisance *per se*. The plaintiff was the owner and occupier of a dwelling-house in a residential portion of Indianapolis. A business block was erected on an adjoining lot, and the defendant opened in it the saloon in question. The plaintiff thereupon brought suit to recover damages for the injury caused by the proximity of the saloon; and it was admitted that the property of the plaintiff had been damaged both for selling and rental purposes. The license granted to the defendant, by the board of commissioners of the county, was set up as a defence, to which the plaintiff demurred. There was no complaint of any improper conduct, or violation of the law, or anything injurious to health or offensive to the senses; so the question came squarely before the court, whether this lawful business, carried on in a lawful manner, could be a nuisance; and the court decided affirmatively, Howard, C. J., and Hackney, J., dissenting.

In a question of nuisance it has been considered as well settled that the injury, annoyance, and inconvenience are regarded rather than the particular trade or occupation from which these resulted; and also that the injury inflicted must be the result of some tangible physical interference on the part of the defendant with the ordinary comforts of life. 1 Wood, Nuis. §§ 2, 3. Were these legal propositions disregarded in the present case? There are two grounds that may be gathered from the discussion of the court upon which the decision may possibly rest. The first is that the business is of such a character that it is impossible to rid it of those attendant circumstances and conditions which of themselves constitute a nuisance because of their necessarily injurious results. 2 Wood, Nuis. 3 ed. § 809. Such a position might be taken where the occupation complained of was itself illegal, and where specific allegations of discomfort or annoyance were unnecessary, as in the case of brothels (11 Md. 128)

or gaming-houses (Bac. Abr. *Nuis.* a ; 10 Mod. 336), or where liquor was unlawfully sold (41 N. J. L. 6) ; but to apply the same doctrine to a business legalized by the legislature, duly licensed and properly conducted, in a suit where the only objections alleged were to the saloon itself, simply as a saloon, seems to be begging the question ; yet the court proceed to do it. A brew-house has been held a nuisance, but always on the same ground as a lime-kiln, chandler's shop, or swine-sty (Waterman's Eden, 264, note), — that unwholesome odors were emitted. A stable is not a nuisance *per se* (36 Ala. 546), nor a tenpin alley, though kept in connection with a lager beer saloon (5 N. J. L. 158), nor a billiard room when conducted in an orderly manner. (8 Cow. 139.) In *Efingst v. Senn*, (Ky.) 23 S. W. 358, where the complaint was that a picnic ground was a nuisance *per se*, the court said : "There can be beer-gardens and pleasure resorts, music and dancing, and yet no nuisance set up. Admittedly, the conduct of such exercise or the running of such a business may result in inconvenience and annoyance to neighbors not participating. It may render the location less eligible as a place of residence ; . . . but, nevertheless these places and modes of amusement are not to be condemned or denounced as nuisances in themselves." Were there no other possible ground for the decision in the principal case, it might be inferred that the learned court thought it should take judicial notice of "all the incidents usually attendant upon such a place ;" upon which incidents it laid great stress, but of which there was neither allegation nor proof.

The other, and at least more satisfactory view of the case is from a moral standpoint. The establishment of a liquor saloon in close proximity to one's dwelling would undoubtedly be a source of great annoyance and perturbation, and tend to render one's property in the vicinity less valuable to rent or sell. Even anti-prohibitionists might consistently object to such surroundings. It is not necessary for one to possess a "delicacy of taste or a refined fancy" to be disturbed by the sale of intoxicating liquors near one's residence ; yet it is submitted that, where it is impossible to show any annoyance through the bodily senses, and where the only ground of complaint is that the defendants' trade is morally offensive and distasteful, the formerly established rule, as applied in *Wescott v. Middleton*, (43 N. J. Eq. 478), would not lead to the same conclusion as that reached in *Haggart v. Stehlin*.

SCOPE OF THE POWER TO REGULATE COMMERCE. — The development at the hands of the courts of the power of Congress to regulate commerce has so frequently taken an unexpected turn, that one can never be sure that the last word has been spoken. In the case of *Swift v. Phila. Ry. Co.*, 58 Fed. Rep. 858, is a wholly new illustration of the wide-reaching nature of this power. The facts of the case are simple. The plaintiff began suit in the State court to recover for excessive charges paid for the carriage of goods from Chicago to New York. The case was removed to the Federal courts because of the diverse citizenship of the parties, and heard before Grosscup, J., who has since attracted attention by other rulings on the Interstate Commerce Act. In a short opinion he held that the action would not lie, — that although the general rule of the common law forbade a common carrier to exact unreasonable charges, yet this rule could have no application to an interstate law, that being

a matter for the exclusive regulation of Congress. The court go on to say that "the fixing of a rate for the carriage of goods from one State to another is not simply an incident of, or appurtenance to, commerce, but is the very core and essence of interstate commerce. A rate for the carriage of interstate commerce, dependent, as it is, for its reasonableness upon so many different considerations of expenditure, business, and interpretations of the laws of different States, is essentially a national affair, and its regulation is, therefore, exclusively national." The reasoning of the court will be seen to follow the test suggested by Mr. Justice Curtis, in *Cooley v. Wardens*, 12 How. 299, that where a subject admits only of a uniform rule there the power of Congress is exclusive.

The decision, it is believed, is entirely novel in holding that the commerce clause renders inoperative a rule of the common law which would otherwise be in force in the States. Obviously, this was the only decision possible if no distinction can be drawn between statutory laws and rules of the common law. For, on the authority of *Wabash Ry. v. Illinois*, 118 U. S. 557, it must be conceded that a statute of a State requiring an interstate carrier to exact reasonable charges only, would be unconstitutional. But if a statute declaratory of a rule of the common law is unconstitutional, it is not easy to see how the rule itself can stand. On the other hand the doctrine of the later cases has been, not that the Constitution *ex proprio vigore* forbids such State laws, but that the Constitution has entrusted the whole matter to Congress, and the silence of Congress is indicative of its wish to have such commerce free from State regulations (see *Bowman v. Ry. Co.*, 125 U. S. 465, and *Wilkerson v. Rahrer*, 140 U. S. 545). So, while it may be true that the silence of Congress is expressive of its wish that a State shall not legislate on the subject, it is a somewhat stronger proposition that the non-action of Congress indicates its desire to have all the existing common law on the subject abrogated. Perhaps something more than mere silence should be required to annul a State law existing at the time of the adoption of the Constitution.

The provision of the Interstate Commerce Act of 1887, that all charges shall be reasonable and just, alters the nature of the question. But the decision is on broader grounds, and its interest comes from its bearing on the general question apart from legislation by Congress.

If the principle be sound it would seem to follow that no action could be brought in a State court, when the haul is an interstate one, for refusal to carry goods, or for negligence in not delivering promptly. Again, at common law the liability of a carrier to account for goods received for carriage is absolute. Yet if this decision be sound it is not easy to see how a State court can properly entertain an action against a carrier for goods lost in an interstate transit. Surely the liability assumed by an interstate carrier is a matter exclusively national within the rule. Similarly the actions which have always been allowed against telegraph companies for errors in transmission, and for non-delivery of messages, would seem to be wrong where the communication is between points in different States.

These results are not suggested for the purpose of throwing doubt on the correctness of the decision. The whole subject is in such a condition that much must be left to speculation. More than once the established landmarks on the subject have been swept away by the necessary development of this branch of the law. This case may be the first step in a further curtailment of State authority.

DISCRETIONARY TRUST—EXECUTION BY COURT. — In the case of *Monson v. New York Trust Co.*, 35 N. E. Rep. 945 (N. Y.), the facts were substantially these: A testator left his property to his executor in trust with a request that his own investments be continued, so long as not detrimental to the estate. The income was to be applied to the use of the widow for her life. Upon her death the executor was to form four trust funds for the testator's four daughters, of "the value and amount of twenty thousand dollars" each, and to pay over the residue to the two sons. The executor had the option of paying the trust legacies of the daughters in money and then investing it, or of setting apart securities out of the estate. The widow received the income of the estate during her life, but upon her death the executor did not form the four trust funds but left the estate *in solido*, paying to each daughter the interest on \$20,000 and the balance of the income to the sons until his own death in 1892. Between the death of the widow and this time the estate had increased greatly in value, owing to the appreciation of certain investments. The sons, therefore, claimed that the residue of the estate should be paid to them after deducting the daughters' shares of \$20,000 each, while the daughters claimed a right to participate *pro rata* in the increase, because, as they alleged, the investments represented the trust estates belonging to them under the will. The court allowed the daughters to participate in the increase of the estate in the proportion their shares of \$20,000 bore to the value of the entire estate at the death of the widow.

The reasoning of the court is as follows: "Although," they say, "the executor had the right upon the death of the widow to pay these trust legacies in money, or to set apart such of the securities in which the estate was invested as in his judgment he should think best (up to the stated value), yet we think that when he omitted to do either, he must be deemed to have made such an allotment proportionately in all of the securities in which the estate was invested." But how can it be said that an executor "must be deemed to have made an allotment" by absolutely refraining from doing anything? A conclusive answer to the argument of the court would seem to be furnished by the simple fact that the executor actually made no allotment but kept the estate *in solido*. Therefore, as no fund was ever set apart for the daughters, they could not invoke the doctrine of following trust property (the real ground that the court adopted) to support any claim to the increase of the estate.

Undoubtedly, the failure of the executor to carry out the trust ought not to prejudice the daughters. As Sir Joseph Jekyll once quaintly put it, "The forbearance of trustees in not doing what it was their office to have done shall in no sort prejudice the *cestuis que trustent*, since at that rate it would be in the power of trustees either by doing or delaying to do their duty to affect the right of other persons; which can never be maintained. Wherefore, the rule in all such cases is that what ought to have been done shall be taken as done." And the remark of Lord Eldon in *Burgess v. Wheate*, 1 Wm. Black. 129, is equally important: "Nothing is looked upon in equity as done but what ought to have been done, not what might have been done." The question, then, in this case, where the court on the death of the executor and his failure to execute the trust are obliged to administer it, is what really "ought to have been done" in view of the expressed intention of the testator? By what rule can the court fairly settle the property between a specific and residuary legatee where the executor had the option of paying the specific legacy

in securities allotted from the estate or in money, and actually did neither?

If the testator had directed his executor to set apart for each daughter such securities of the estate as he saw fit to the value of \$20,000, without any option to pay money, and the executor had failed to do so, the court in executing the trust upon the executor's death would doubtless have allowed each daughter to share in any increase of the estate in the proportion her \$20,000 bore to the entire estate at the time the breach of trust was committed. In such a case one could say the testator evidently intended to give each daughter a portion of his investments. That is, the executor would be bound to use his discretion and to exercise it upon those particular funds. The court would, acting in his stead, apply the only equitable rule of dividing the increase among the legatees in the proportions the amounts of their original legacies bore.

But the principal case seems different. The executor was not obliged to form the trusts for the daughters out of the investments, for if he wished he could pay them in cash. He did neither. What rule can the court adopt which, when generally applied, would carry out the intention of the testator?

It is evident from the will that the primary object of the testator was to provide for his daughters trust legacies of \$20,000 each. Trusts to that amount were to be formed in spite of all fluctuations of the estate between the death of the testator and his widow. That is, any loss that might occur up to the time of the division was evidently to be borne by the sons. They were to have all the risk. And it would, therefore, be wholly contrary to the plain design of the testator to suppose the daughters would have to bear the loss proportionately with the sons if the estate had depreciated in value, and the court had had to execute the trusts. Surely it would, then, have been urged as eagerly that the trust legacies were pecuniary, as it was in the principal case that they be treated as shares in the investments existing at the widow's death. And the contention would have been right and would have prevailed, for the intention was to protect the daughters in any event. But, whatever rule be adopted, it seems clear it ought to be reasonably consistent, and not such as would allow the daughters to call their interests pecuniary legacies when the estate depreciated, and shares in the specific investment when it increased in value. The court cannot say the executor ought to have allotted the investments, because that matter was discretionary with him. The only theory whereby the testator's evident intention of providing for his daughters in any event can be carried out is the one which treats the trust funds to be formed for them as payable in cash.

Since, therefore, the sons as residuary legatees would have to bear any depreciation of the estate they ought to get the increase. When this argument was pressed by counsel in the principal case, the court met it by dodging it. "What might have been the result," they say, "of a contention upon facts which never occurred, and under circumstances which probably would have differed radically from those now under our observation, it is plainly useless to speculate concerning." This speculation so "plainly useless" seems the turning point in the case. Moreover, if it is correct to assume that courts decide cases upon principles of law, and not upon the particular merits of each controversy, it is always not only relevant but absolutely necessary for a Court to consider the effect of a principle it adopts when generally applied.

IS THIS LIBEL? — MORE ABOUT PRIVACY. — A tutor tried for the murder of his pupil shot in the back, large amounts of insurance on the life of the man killed in favor of the wife of the tutor, and curious holes in boats which the pupil might have used, recently furnished the materials for a *cause célèbre*, in Scotland, the Ardlamont Case, in which the charge against the defendant, Mr. Alfred John Monson, was found "not proven." Mme. Tussaud very naturally put up an effigy of Mr. Monson, and Louis Tussaud at Birmingham did the same. In London he was placed just within the turnstile where one pays 6*d.* to see the Chamber of Horrors, which is reached by descending a staircase, from the room where Mr. Monson keeps company with Pigott, Scott (a mysterious person also concerned in the Ardlamont case), Mrs. Maybrick, and relics and pictures of Napoleon. The Chamber of Horrors contains a representation of the "Scene of the Ardlamont Mystery." At Birmingham, with either more politeness or more caution, he was placed opposite His Grace of Canterbury and Prince Bismarck, and between the Royal Family and a group containing the Pope and Cardinals Vaughan and Logue, but in the advertisements his neighborhood was less pleasant; for the public were invited to "see Vaillant, the Anarchist, and Monson, of Ardlamont."

Not satisfied with the experience of the law which he had already had, Mr. Monson sought injunctions preliminary to the trial of libel suits for these indignities, and got them from the Divisional Court, Matthew and Collins, JJ. (10 Times L. R. 199.) On trial of the appeal, however, new evidence pointed toward extraordinary conduct on the part of Mr. Monson, for it appeared that, not content with publishing a pamphlet about his case, and advertising to deliver lectures on the subject, he had probably let a confidential friend offer to the proprietors of Mme. Tussaud's to supply them with "the clothing and the gun which Mr. Monson was using at the time of Lieut. Hambrough's death" and "a sitting by Mr. Monson to assist the portrait modeller." (10 Times L. R. 227.) It being the practice of the English courts not to give an injunction against libels, unless in clear cases, action in favor of the plaintiff was after this out of the question. But for these reasons we have the opinions of five judges on the questions raised by the case, Collins and Matthew, JJ., below, and Lord Halsbury and Lopes and Davey, L. JJ., above; and of these last only Davey, L. J., resisted the temptation to go beyond the new evidence which settled the matter and discuss the whole case.

It was attempted more or less successfully to treat the cases as raising purely questions of libel, neither counsel nor court meaning apparently to go beyond this, and as the effigy seems to have been considered not libellous *per se*, the discussion, apart from the new evidence, turned upon the consideration of the innuendoes. If the defendant meant that Mr. Monson had committed a murder (and the jury might well be allowed to give this such a meaning, *Broom v. Gosden*, 1 C. B. 728; *Patch v. Tribune Association*, 38 Hun, 368), undoubtedly the representation was libellous; but had the plaintiff a case which justified injunction? Collins and Matthew, JJ., and Lord Halsbury thought that he had. Lopes, L. J., dissented from this view, and Davey, L. J., expressed no opinion. Taking into consideration the whole circumstances of the case, one could fairly say that, if this was the innuendo and if it were false, the representation was calculated to bring the plaintiff into hatred, ridicule, and contempt; but it seems that it would be equally fair to say that it is doubtful whether, considering that at the trial any mild innuendo would be op-

posed by a defence of truth, and any direct one, such as this, difficult of proof, there was here a case for the court to undertake the very delicate task of enjoining a libel, and it is perhaps more than doubtful whether, if solely this aspect of the case had been before the court, there would have been shown any such willingness to grant the injunction.

But the chief interest of the case is brought into it by the fact that it borders so closely upon the law of Privacy that counsel and court, alike, seeking to discuss only the question of libel, let fall again and again expressions which show most clearly that a large part of the plaintiff's real case is that, whatever the circumstances may be, it is outrageous to allow a wax-work figure of a person, who is not a public character, to be exhibited in a place like Tussaud's, without the consent of the person thus pilloried. North, J., in *Pollard v. Photographic Co.*, 40 Ch. D. 345, stated the difficulty squarely when he asked counsel, whether one could exhibit and sell copies of a photographic negative taken on the sly. He was answered that there would then be no trust, or confidence, or implied contract, and so no right to stop such a sale; but, as has already been pointed out in the REVIEW, the weakness of courts for hiding judicial legislation under such implications has brought them substantially to a point where the implication is one of law and the contract fictitious. Only in phraseology does this differ from a right of privacy. Whether Mr. Monson's pamphlet, his offers of lecturing, and the like, may not be taken to be a submission of the question to the public, and whether he may deny the public a right to see representations of the scene of the tragedy, and his picture, or effigy, when he is foolish enough thus to drag before it the history of the whole case, are questions which might of course be raised, if his right were squarely considered upon these grounds. But counsel and court slip rather than step into such considerations. "Suppose," says Coleridge, Q. C., "you burnt a man in effigy. I submit that you could not bring evidence to show that he was in fact a ridiculous person. . . . There is a great distinction between a public and a private man." Later Collins, J., asked him, "You say it is impossible to exhibit a man of bad character without a libel?" "Yes," was the answer, "when the object is to gratify the public curiosity by the exhibition." And Lord Halsbury launches this well-merited invective against the people who refuse to let others alone. "Is it possible to say that everything which has once been known may be reproduced with impunity in print or picture, — every incident of a criminal or other trial be produced and its publication justified; and not only trials, but every incident which has actually happened in private life, furnish material for an adventurous exhibitor, dramatized perhaps, and justified, because, in truth, such an incident did really happen?" When counsel and court see the justice of the plaintiff's case in such a light, even if Coleridge, Q. C., says that he treats it as "substantially . . . a case of ordinary libel," outsiders may fairly ask: is this libel? Or is it an inarticulate recognition of the tendency to extend the rights of the person to cover the case of unwarranted and unauthorized representations?

RECENT CASES.

BILLS AND NOTES — FICTITIOUS PAYEE. — The cashier of plaintiff bank drew checks on defendant bank payable to customers of plaintiff. The cashier then indorsed the checks in the names of the customers, which were put into circulation and paid by the defendant. *Held*, these checks were in legal effect no different from checks payable to non-existing persons, because the names used were those of customers of the bank. Plaintiff is liable to defendant for the amount of the checks. *Phillips v. Bank*, 35 N. E. Rep. 982 (N. Y.).

The case seems perfectly sound, and is well reasoned. As the court say: "The fictitiousness of the maker's direction to pay does not depend upon the identification of the name of the payee with some existent person, but upon the intention underlying the act of the maker in inserting the name." That is, if the maker intends to use a name in a bill he has drawn to realize money fraudulently, he is in effect drawing it payable to himself, and his own indorsement in the assumed name passes good title. This way of working out the rights of the parties seems more satisfactory than the ordinary treatment of such bills as payable to bearer.

BILLS AND NOTES — IMMATERIAL ALTERATIONS. — Purchasers of goods gave in payment therefor a note payable to the plaintiff bank (the respondents), all the parties to the sale going to the bank to get it discounted. To satisfy the bank, the vendor signed his name below those of the makers; but fearing he would be held on it as a maker he afterwards returned to the bank and persuaded the cashier to change the note, so as to make it payable to his order, and then indorsed it and guaranteed it on the back to the bank, erasing his signature from the face of the note. *Held*, that as this alteration did not change the liability of the parties to the note, it was no defence to an action upon it. *Reilly v. Trust Nat'l Bank*, 35 N. E. Rep. 1120 (Ill.).

The decision is rather a striking instance of what will be deemed an immaterial alteration. The vendor before the note was changed was an anomalous indorser, and in those States where such an indorser is held to be a joint maker, it is submitted the decision must necessarily be against the plaintiff. In Illinois an anomalous indorser is presumably a guarantor, and there the alteration would not seem to increase the maker's liability. On the general question as to what constitutes an immaterial alteration, see 2 Daniel Negot. Inst. 3 ed. § 1398 to § 1400, 1 Ames Cas. on Bills and Notes, p. 449. For the position of an anomalous indorser in Illinois see 1 Ames Cas. on Bills and Notes, p. 271, note c.

CARRIERS. — Action for injunction, by a railway company against defendant, a hackman, to restrain the latter from entering upon the grounds and station of the plaintiff to solicit passengers. *Held*, that section 34, c. 565, Laws of 1890, prohibiting carriers from giving "preference for the transaction of business of a common carrier upon its grounds, etc., to any one of two or more parties competing in the same business, etc.," does not apply to the present case, but only where the competing parties are "under contractual relations" with the carrier; and that the plaintiff has the right to exclude the defendant from its grounds, when he is not under contract with a passenger. *New York Central & H. R. R. Company et al. v. Flynn et al.*, 26 N. Y. Sup. 859.

It is difficult to see what force is left to the statute by this construction, but the scope of the decision is clear, to the effect that by common law a carrier may exclude a hackman seeking to enter its grounds for the purpose of soliciting patronage. The same decision is reached in *Railroad Company v. Tripp*, 147 Mass. 35, which is cited and approved by the New York court. The true view of this question seems to be based upon the reasonableness of such a regulation made by a carrier, in the light of the carrier's duty to the public to furnish ready means of access to its stations, and to facilitate the arrival and departure of its passengers and their baggage. The weight of authority appears to look with disfavor upon excluding certain hackmen and favoring others, as tending to inconvenience passengers and to create a monopoly resulting in increased hack-fares, etc. *Railroad v. Langlois*, 9 Mont. 419; *Hack & Bus Company v. Sootsma*, 84 Mich. 194; *Cravens v. Rodgers*, 101 Mo. 247; *McConnell v. Pedigo et al.*, 18 S. W. Rep. (Ky.) 15; *Steamboat Company v. Transportation Company*, 10 So. Rep. (Fla.) 480.

CONSTITUTIONAL LAW — ACT EXCLUDING CHINESE. — *Held*, that an Act attempting to prohibit Chinese from coming into the State is in conflict with that clause of the United States Constitution giving the general government authority to regulate commerce with foreign nations. *Ex parte Ah Cue*, 35 Pac. Rep. 556 (Cal.).

This case decides correctly, it seems, a very interesting point. The court treat the question as too clear for extended argument.

CONSTITUTIONAL LAW — CORPORATIONS. — *Held*, that an Act imposing on a railroad corporation absolute liability for fires communicated by locomotive engines is not unconstitutional. *Mathews v. St. Louis & S. F. Ry. Co.*, 24 S. W. Rep. 591 (Mo.).

A former case in Missouri held that it was a constitutional provision to impose absolute liability on a railroad for all cattle killed. That decision would seem to require the present result because the fires in the engines are much more under the control of the company than are cattle in the fields along the line.

CONSTITUTIONAL LAW — INTERSTATE COMMERCE — UNREASONABLE CHARGES BY CARRIERS. — Plaintiffs brought suit in a State court against defendant, a common carrier, for charging unreasonable rates for transporting plaintiffs' beef to other States. The suit was removed to the United States District Court by virtue of the citizenship of the parties. *Held*, by Grosscup, Dist. J., that the suit could not be maintained. Plaintiffs could not avail themselves of the Interstate Commerce Act in a suit brought originally in a State court; and the common law of the State could not be applied, because charges for interstate carriage are a subject of interstate commerce requiring uniform regulation, and must be regulated exclusively by the law of the United States. *Swift et al. v. Philadelphia & R. R. Co.*, 58 Fed. Rep. 853.

For comment see p. 488, *ante*.

CONSTITUTIONAL LAW — STATE CONSTITUTION — PROPERTY QUALIFICATION FOR OFFICE-HOLDERS. — Section 4 of Article 4 of the Constitution of West Virginia provides that "no person except citizens entitled to vote, shall be elected or appointed to any State, county, or municipal office; but the governor and judges must have attained the age of thirty, and the attorney-general the age of twenty-five years, at the beginning of their respective terms of service; and must have been citizens of the State for five years next preceding their appointment." Section 5 of the same article after prescribing a certain oath for office-holders continues: "And no other oath, declaration, or test shall be required as a qualification unless herein otherwise provided." Section 8 of the same article provides that "the legislature shall prescribe by general laws the terms of office, powers, duties, and compensation of all public officers and agents, and the manner in which they shall be elected, appointed, and removed." *Held*, that these clauses do not restrain the legislature from prescribing further qualifications for office-holders in addition to those which they themselves contain; and that an Act of legislature requiring all members of municipal councils to be freeholders is constitutional. Brannon, J., dissenting. *State v. McAllister*, 18 S. E. Rep. 770 (W. Va.).

This decision is in accord with what little authority there is on the subject. The cases relied on by the majority of the court in their construction of section 4 may be distinguished, as the dissenting judge points out, by the fact that the clauses there construed stop with the general provision that none but voters shall be office-holders, and do not contain any special qualifications for particular offices. But in view of the sound principle, which is the one applied by the majority of the court in the principal case, that State constitutions are to be construed as limitations and not as grants, it is clear that the section only forbids the legislature to expand the class from which offices are to be filled beyond the given limits, and leaves it free to contract that class at will.

CONTRACTS — YEARLY HIRING. — Plaintiff was appointed janitor of a school building in September, 1878, by a resolution of defendant board of education. Resolutions of re-employment were passed in some years, and in others defendant was continued in his position without any resolution, until 1888, when plaintiff began his work in September, no resolution of re-employment having been passed. In October, defendants engaged another man as janitor. It was admitted that plaintiff had discharged his duties faithfully. *Held*, that plaintiff was hired by the year and could maintain an action for breach of contract. *Laughlin v. School District*, 57 N. W. Rep. 571 (Mich.).

It seems to be assumed that plaintiff was not a public officer and that this was a private contract. On that assumption the case is undoubtedly correct. *Beeston v. Collyer*, 4 Bing. 309; *Williams v. Byrne*, 7 Adol. & Ellis, 177; *Sines v. Superintendents*, 58 Mich. 503. But if plaintiff was a public officer, employed by the board under an ordinance, the decision might be otherwise. By defendants' failure to hold an election in September, plaintiff would hold over. But his holding over would not cause the board to lose their right to elect another janitor subsequent to September. See Dillon on Mun. Corp., 4th ed., vol. 2, sect. 839, note 1.

CORPORATIONS — ASSIGNMENT FOR THE BENEFIT OF CREDITORS BY A FOREIGN CORPORATION. — A New Jersey corporation, doing business in New York, becoming insolvent, made an assignment of all its property to the predecessors of the plaintiff for the benefit of all its creditors pro rata. Subsequently, personal property in New

York, belonging to the said corporation, was attached at the suit of a New York creditor, and the plaintiff brought trover against the attaching sheriff. The sheriff set up the laws of 1890, chap. 564, § 48, which provided that an assignment by an insolvent corporation shall be void. *Held*, that the statute applied to domestic corporations only, and as the assignment was valid by the law of New Jersey, where the corporation was domiciled, it is valid in New York as regards the personal property in question. *Vanderpoel v. Gorman*, 35 N. E. R. 932 (N. J.).

CORPORATIONS — POWER OF FOREIGN CORPORATION TO DEAL IN DOMESTIC REAL ESTATE. — *Held*, by the Court of Appeals of New York, that a foreign corporation chartered for the purpose of buying and selling real estate can give good title to land purchased by it in New York. *Lancaster v. Amsterdam Co.*, 35 N. E. Rep. 964 (N. Y.).

The court put their decision on the broad ground that it is not the policy of their State, so far as can be seen from its legislation, to restrict foreign corporations dealing in real estate any more than those engaged in other business. The courts of Illinois hold that it is the policy of their State to keep land out of the hands of corporations, and their decisions are *contra* to the decision of the principal case.

CRIMINAL LAW — JURISDICTION. — A statute of South Carolina made it an indictable offence to "administer to any woman with child, or prescribe or procure for any such woman . . . any medicine . . . with intent thereby to cause or procure the miscarriage or abortion of any such woman." *Held*, under this statute the courts of South Carolina have jurisdiction over the defendant who bought drugs in another State and sent them to a woman living in South Carolina with intent to procure an abortion. *State v. Morrow*, 18 S. E. Rep. 853 (So. Car.).

The decision seems correct. It is like the case of a man's standing in one jurisdiction and shooting at and killing a man in another jurisdiction. In both the supposed case and the principal case, the offence was committed where the act took effect, and courts of that jurisdiction should have power to punish. The authorities on this subject, which are somewhat scanty, are collected in 1 Bishop, *Crim. Law*, 8th ed. § 110. For a case of shooting, see 7 HARV. LAW REV. 239.

EQUITY JURISDICTION — CONTROL OF PROPERTY PENDING INQUISITION OF LUNACY. — *Held*, that the Court of Chancery of Delaware, by special legislative grant, has jurisdiction of alleged lunatics from the very inception of the process by which their sanity or insanity is definitely ascertained, and has the power to suspend or supersede the control of the supposed insane person over his property *ad interim*. *In re Harris*, 28 Atl. Rep. 329 (Del.).

In England the Court of Chancery has no jurisdiction, strictly speaking, over the persons or property of non-adjudged lunatics, as such, and the chancellor of England only has jurisdiction of that class of persons as the representative of the king, as *parens patriæ*, by means of his sign manual. See *In re Heli*, 3 Atk. 634. So the Court of Chancery in Delaware does not possess this special authority as a part of its inherent, original, equitable jurisdiction, but derives it from the Legislature, as the chancellor of England derived it from the king.

EQUITY JURISDICTION — RIGHT TO PRIVACY — PICTURE IN NEWSPAPER. — An injunction will lie against the publication of a picture of the plaintiff in the defendant's newspaper, with an invitation to readers of the paper to vote on the question of the popularity of the plaintiff as compared with another person, whose picture is also published in such paper. *Marks v. Joffa*, 26 N. Y. Supp. 908.

This question is discussed in 4 HARV. LAW REV. 193, in an article by Messrs. Warren and Brandeis, referred to by the court in its opinion.

EVIDENCE — COMPARISON OF HAND-WRITINGS. — *Held*, a writing specially prepared for the purpose of comparison is inadmissible on a question of genuineness. *Hickory v. United States*, 14 Supr. Ct. Rep. 334.

The result seems sound on any view. The common-law view in England and many of the States was that if the paper was properly in evidence for some other purpose, a comparison between that and the contested paper could be made; otherwise, not. This has been changed by statute in England, and the opposite rule laid down by the courts in many States, — namely, that a paper may be put in evidence for the sole purpose of comparison. The Supreme Court decided, in *Moore v. United States*, 91 U. S. 271, that the common-law English view obtained in that court, but they treat this as a separate question. It is submitted that courts holding either of the above views could reach this conclusion; for it would be very absurd for courts holding that no paper not properly in evidence for some other purpose could be the subject of comparison to lay down the rule that one especially prepared could be so used. On the other hand, courts holding the opposite view might well say that such a paper could not be used

in this manner with fairness, because the very fact that it had been prepared for the sole purpose of showing that the other contested paper was a forgery, would exclude it from the category of fair specimens. It is difficult to see why the same result might not have been reached by considering simply the general rule, without dealing with the question as one not coming under it. For a discussion of the general rule and the result reached in various States, see Rogers on Expert Testimony, §§ 130, 131.

EVIDENCE — PAROL EVIDENCE — CONSTRUCTION OF DEED. — W owned two adjoining surveys, one called a "Bounty," and the other a "Headright." He conveyed the bounty to C, who executed a deed to plaintiff's grantor, containing the following description: "The undivided half of 1,280 acres of land situated in the southeast part of Falls County, on the waters of Big Creek, being the headright of W, and reference being hereby made to the patent of said W for the boundaries of said tract of land." This description applied perfectly to the headright; and with the exception of the word "headright" it applied equally well to the bounty. *Held*, that the title to the bounty could pass by this deed, for there was a latent ambiguity, and parol evidence was admissible to explain it. Key, J., dissenting. *Minor v. Powers*, 24 S. W. Rep. 710 (Tex.).

The majority of the court follow *Patch v. White*, 117 U. S. 213. The dissenting judge distinguishes that case on the ground that the description in that case did not exactly fit either lot. The opinion of this dissenting judge brings out neatly the real nature of the question before the court. Even he, who applies the so-called rule of evidence the most strictly, admits that the facts actually offered could be considered if they had one more fact to go with them, namely, that C was ignorant of the existence of the headright, and then the title to the bounty would pass under the deed. But if there were any rule of evidence excluding the facts offered, it must apply when they are offered with the additional fact, as well as when they are offered alone. The question, then, which the court passed on was not whether the facts could be considered, but whether on being considered they showed that C's deed was made for a description of the bounty. It is submitted that this is the proper question in all these cases, and that the decisions should only differ according as the courts think the facts offered — leaving out, of course, the grantor's declaration of his intention — prove that the description was made for the lot claimed or not. It is further to be noticed that the decision in this case is incompatible with any such rule as is suggested by the opinion of Chief Justice Shaw, in *Tucker v. Seaman's Aid Society*, 7 Met. 188, to the effect that when there is something which exactly fits the description in the instrument the investment can pass title to nothing else.

EVIDENCE — PRIVILEGED COMMUNICATIONS — WAIVER OF PRIVILEGE. — Defendant was tried for perjury. Letters written to him by his wife, and given by him to his mistress, who in turn gave them to the district attorney, were offered in evidence by the State. Defendant objected on the ground that they were privileged, as confidential communications from a wife to her husband. *Held*, that when the husband made the letter public by giving it to another, the confidential character of the communication was destroyed, and it may be put in evidence if otherwise admissible. *People v. Hayes*, 35 N. E. Rep. 951 (N. Y.).

The decision is sound. It is analogous to the cases where confidential communications which have been overheard by third parties may be testified to by such parties. 1 Greenl. Ev. § 254, n. (a); Chamb.'s Best on Ev., c. 9, 535 (e).

EVIDENCE — RES GESTÆ. — Deceased, after being shot, ran out of the room, and meeting in the hallway his wife, who was coming to his assistance, made certain declarations as to who had shot him. *Held*, that the declarations were not part of the *res gestæ*, and were therefore inadmissible. *Parker v. State*, 35 N. E. Rep. 1105 (Ind.).

This case unnecessarily restricts the *res gestæ* exception to the hearsay rule. It is much like *Regina v. Beddingfield*, 14 Cox C. C. 341, a case which is generally discredited. The evidence should be admissible if the declarations were in a fair sense contemporaneous with the transaction, which is the subject of proof for the state of mind excited by the transaction, and the vivid realization of the circumstances must be supposed to continue for a short time and not to end abruptly with the event itself. The court appear to recognize this rule when they say that the transaction must not be so far past that the declarations amount to a narration, but they do not apply it correctly to the facts of the case, and are not supported by the current of authorities.

HUSBAND AND WIFE — TIME OF DISAFFIRMANCE OF DEED BY AN INFANT WIFE. — A statute removed coverture as a disability to an avoidance of conveyances of land in which an infant wife has joined with her husband. *Held*, the interest in dower is

inchoate until the death of the husband, and not until then does a right of action accrue to enforce it. So, notwithstanding the statute, the wife need not disaffirm within a reasonable time after reaching majority, but only after right to dower has accrued. *McClanahan v. Williams*, 35 N. E. Rep. 897 (Ind.).

It is submitted that the decision is wrong. If a wife, who is an infant, has an inchoate right of dower which she can grant before any right of action to enforce it has accrued, why is it not, in the absence of the disability of coverture, a right which can be disaffirmed upon reaching majority?

INSURANCE — DELIVERY OF POLICY — AUTHORITY OF AGENT. — M, an agent for a number of insurance companies, was instructed by the plaintiff to keep the insurance on his property up to a certain amount in reliable companies. Under this arrangement, M and the plaintiff had settlements, usually every month, when the premiums would be paid. One company having directed M to reduce its risk with the plaintiff, M, as a substitute, made out a policy for the plaintiff in the defendant company, which he notified. The old policy had been deposited by the plaintiff in a bank as security, and M went there several times to make an exchange with the board by giving up the policy in the defendant company in return for the one that had been cancelled. But as the cashier, who had the custody of the policy, happened to be out each time M called, no exchange was made; though afterwards, meeting the cashier out of hours, he informed him of what he had done, and the cashier assented to the exchange. Before it was made, however, or the premium on the policy paid, the property was destroyed by fire. *Held*, that the company was liable, as M was the mere custodian of the policy for the plaintiff; and that as general agent of the defendant, M had authority to waive the payment of the premium, which the customary monthly settlement showed was the case. *Newark Machine Co. v. Keaton Ins. Co.*, 35 N. E. Rep. 1060 (Ohio).

For a discussion of the principles on which this case is decided, see 1 May on Insurance, § 56.

MUNICIPAL CORPORATIONS — LIABILITY FOR TORT. — The city of Tacoma, having power to improve parks, and to regulate the use thereof, was licensed by the owner of land to occupy it as a park. By the negligence of the officers engaged in improving the park, the plaintiff was injured. *Held*, that he could not recover against the city. *Russell v. City of Tacoma*, 35 Pac. Rep. 605 (Wash.).

This case makes the correct distinction between the actions of the city which are for the public benefit and those which are for the corporate benefit, a distinction which the New York court failed to make in *Speir v. City of Brooklyn*, 34 N. E. Rep. 727. See 7 HARV. LAW REV. 240.

PARTNERSHIP — ASSUMPTION OF DEBTS BY NEW FIRM — SURETYSHIP. — A partner gave notice to a firm creditor of his retirement from the firm and of the fact that the new firm had assumed the debts of the old one. Subsequently the creditor gave an extension to the new firm without the consent of the retiring partner. *Held*, that by the arrangement the new firm and the retiring partner assumed the positions of principal and surety, and that an extension to the principal released the surety. *Hall v. Johnston*, 24 S. W. Rep. 861 (Texas).

As between themselves, the retiring partner and the new firm became surety and principal, and notice to the creditor made it inequitable for him to treat them in any other way, as his substantial rights were not thereby affected.

REAL PROPERTY — COVENANTS FOR TITLE — DEFECT OF TITLE APPEARING IN THE CONVEYANCE. — A agreed with a railway company for the sale to them, in fee, of land to which she derived her title under the will of X; and on the construction of that will depended her ability to make a good title. The sale was completed by a deed which fully recited the will of X, and purported to convey the land in fee, and in which A entered into the usual covenants for title. *Held*, in an action upon the covenants, that they extend to defects of title apparent upon the face of the deed, as contained in the will there recited. The deed purported to convey an unincumbered fee-simple, and a vendor's covenant extends to the title expressed to be conveyed to the vendee. *Page v. Midland Railway Company*, [1894], 1 Chan. 11.

This decision is a most satisfactory one, overruling *Hunt v. White*, 37 L. J. (Ch.) 326; and opposes the principle laid down in a recent Massachusetts case criticised in a note in 7 HARV. LAW REV., 429. In that case, a second mortgage purported to convey a fee, subject to the prior mortgage and to a certain right of drainage, and contained covenants for title, subject to the right of drainage. *Held*, that the covenant extends to the first mortgage, and thus in effect insures against an incumbrance subject to which the conveyance is expressly made. The two cases are broadly distinguished

on the ground that in the one a fee-simple is purported to be conveyed, and in the other a fee-simple subject to the prior mortgage. *Ayer v. Philadelphia and Boston Face Brick Company*, 157 Mass. 57; 159 Mass. 84.

REAL PROPERTY — COVENANT RUNNING WITH THE LAND. — A mill company owning land on a stream desired to dam the stream to form a mill-pond. They agreed with the town that they would build a new bridge over the stream and also new highway approaches thereto, and that they would keep the same in repair. Defendants were successors in title to the mill company and refused to repair the highway, whereupon plaintiff repaired it and brings an action for money paid. *Held*, (overruling a demurrer to the declaration) that such a covenant may run with the land so as to bind the covenantor's successors in title. *Inhabitants of Middlefield v. Church Mills Co.*, 35 N. E. Rep. 780 (Mass.).

The opinion in this case might have been more satisfactory. Judge Holmes says: "It is true that in general active duties cannot be attached to land. But there are some exceptions, and most conspicuous among them is the obligation to repair fences and highways." And again "we do not deem it advisable to discuss the law in detail until the facts shall appear more exactly than they do at present." It is submitted that this decision is open to criticism. The general rule is that the burden of a covenant will not run with the land; to this there are, it is true, several exceptions; but in all the cases where the burden of a covenant has run with the land, there has been some connection, "some privity of estate," between the parties to the covenant. In the principal case, no land was granted of which this highway was a part, and to which the covenant might be annexed; in fact, no interest would seem to exist other than a personal interest between the plaintiff covenantee and the original covenantor. From the facts of the case it does not even appear that the defendants were abutters on this highway. *Tiedeman on Real Prop.* (2d ed.) § 862, n. 5; 2 *Washburn on Real Prop.* (4th ed.) 286-7; 1 *Smith's Leading Cases* (9th Am. ed.), Notes to Spencer's case.

REAL PROPERTY — LEASE — FORFEITURE. — A made a lease to B, with C as surety. In the lease was a clause providing that if any of the covenants of the lessee were not performed, the lessor should have a right of re-entry, "without such re-entry working a forfeiture," and the covenants were to be performed as to payment of rent, although there was a re-entry. Covenants were broken. A re-entered, and now sues C on the contract of suretyship. *Held*, A can recover the money covenanted to be paid, — not as rent, but as damages. *Grommes v. St. Paul Trust Co.*, 35 N. E. Rep. 820 (Ill.).

The case is undoubtedly correct, and is interesting as showing the ingenuity of the attorney who drew the lease. The lessee by his own act has ended the estate, or justified the lessor in so ending it; but he and his surety are liable on the contract to pay the amount stipulated as damages.

REAL PROPERTY — LEASE — SURRENDER BY OPERATION OF LAW. — Defendant leased of Hance, plaintiff's agent, office rooms for three years, and was prohibited by the terms of the lease from assigning or sub-letting. Defendant informed Hance that he was going to vacate and would get another tenant. Hance said that he had a scheme of renting the rooms, and objected to defendant's procuring a tenant. This was March 20, and a few days later defendant gave Hance the key, having moved out. Hance made negotiations with various parties for renting the rooms, but did not succeed, and put a sign "Rooms to Rent" in the window June 1. He demanded rent of defendant some time in April. *Held*, this was not a surrender by operation of law. *Stern v. Thayer*, 57 N. W. Rep. 329 (Minn.).

This is a very close case, yet it seems rightly decided. The facts were, on the construction of the court, that though Hance attempted to rent the premises again, he informed the defendant that he was responsible in case he could not rent, or if he was forced to rent for a smaller amount. This is precisely like the case of *Auer v. Penn.*, 99 Pa. St. 370. The closeness of the case depends on the construction of the court as to the facts.

REAL PROPERTY — PARTY WALLS. — Motion for the dissolution of an injunction forbidding the defendant to tear down a party wall, in order to erect one better suited to his requirements. The wall was situated on the dividing line between the land of the plaintiff and that of the defendant, and had been used by them for more than twenty years. *Held*, that the injunction must be dissolved. Either adjoining owner had the right to repair a party wall, or to tear it down to rebuild it; but must, in so doing, cause his neighbor as little inconvenience as practicable, and reimburse him for expenses necessarily incurred in protecting his property. *Putzell v. Drovers' and Merchants' Nat. Bank*, 28 Atl. Rep. 276 (Md.).

In the above case the court make no distinction between party walls owned in common and those which are divided by the boundary line between the adjoining premises into two strips, each belonging to the person upon whose land it stands, and having an easement against the other strip for its support. The decision is in accordance with authority both in England and in the United States. "As I have read the law from the statements of eminent judges, he [the tenant in common] has a right to pull down when the wall is neither defective nor out of repair, if he only wishes to improve it, or to put up a better or handsomer one." Sir George Jessel, in *Banks v. Stokes*, 9 Ch. Div. 72.

REAL PROPERTY — RESTRICTION AS TO USE OF PREMISES. — Part of the consideration in a deed of land was that the property should not be used for the sale of liquor. There was also a condition that if the prohibitory clause was violated, then the land was to revert to the grantor. The original grantee sold to defendant, who broke the condition. *Held*, the land is forfeited to the original grantor, though "heirs and assigns" is not mentioned in the deed. *Odessa Imp. Co. v. Dawson*, 24 S. W. Rep. 576 (Tex.).

This is an extension of the doctrine laid down in 66 Tex. 465. It is submitted that it is a sensible one. The defendant is chargeable with notice of the contents of the deed containing the condition. The condition applies to the lot itself, and not to the grantee, in terms. The condition was part of the consideration, and the vendor presumably received a smaller price than he would otherwise have taken. There seems to be no good reason for defeating the expressed intention of the parties when the purchaser has taken with notice of the restriction, as here. *Hodge v. Sloan*, 107 N. Y. 244, and *Uppington v. Corrigan*, 36 Hun, 320, favor this view. In *Fuller v. Arms*, 45 Vt. 400, the court say, under somewhat similar circumstances, that all that passed to the grantee was the use of the land so restricted, and that the grantee could convey no more than he had. *Carter v. Williams*, L. R. 9 Eq. 678, tends to support the principal case. But see *Wilson v. Hart*, L. R. 1 Ch. App. 463.

REAL PROPERTY — WILLS — ATTESTATION BY HUSBAND OF LEGATEE. — *Held*, that a statute making void a legacy to an attesting witness, does not apply to a legacy to the husband or wife of such witness, as there is not enough unity of interest between husband and wife to create in one a present direct or certain interest in a legacy to the other. *In re Holt's Will*, 57 N. W. Rep. 219 (Minn.).

Under similar statutes, Massachusetts has the same rule, based, however, upon the ambiguous and unsatisfactory authority of *Hatfield v. Thorpe*, 5 B. & Ald. 589; *Sullivan v. Sullivan*, 106 Mass. 474. The contrary decision, having for its foundation the consideration of the difficulty sought to be avoided by the statute, is to be preferred, and is law in Maine and New York. *Winslow v. Kimball*, 25 Me. 493; *Jackson v. Wood*, 1 Johns. Cas. 163; and *Jackson v. Durland*, 2 *ibid.* 314 (N. Y.).

STATUTE — HAWKERS AND PEDDLERS, WHO ARE. — *Held*, a person who sells stoves by sample is not a peddler within the meaning of a statute imposing a tax on "every itinerant person or company peddling stoves." *State v. Lee*, 18 S. E. Rep. 713 (N. C.).

The decision is clearly correct, and is in accord with the weight of authority. See note in 57 Am. Rep. 136. A peddler is one who carries with him the whole or a large part of his stock in trade, and not one who sells by sample. But see *Graffy v. City of Rushville*, 107 Ind. 502. Two recent cases in accord with the principal case are *Village of Stamford v. Fisher*, 35 N. E. Rep. 500 (N. Y.), and *Hewson v. Inhabitants of Englewood*, 27 Atl. Rep. 904. See note to the latter case in Green Bag, vol. 6, p. 96. In *Machine Co. v. Gage*, 100 U. S. 676, such a tax was held to be constitutional.

TORTS — ACTIONABLE NUISANCE. — A rented property to B for the sale of liquor. The property was in a neighborhood where there were no saloons, but churches, schools, and quiet and orderly inhabitants. B had a license under the statute of the State to sell liquor. Plaintiffs brought this action against A and B for a nuisance, because a saloon next them had greatly lessened the rental value of their house, and was offensive to them. *Held*, though the sale was under legislative sanction it created a nuisance, and a private person who is injured can maintain an action against both A and B. The license simply freed them of liability to the State.

Howard, C. J., and Hackney, J., dissented on the ground that a business made lawful by the statutes of the State is not, when properly conducted, actionable as a nuisance. *Haggart v. Stehlin*, 35 N. E. Rep. 997 (Ind.). For a discussion of this case, see the Notes.

TORT — CONSPIRACY — COMBINATION OF EMPLOYERS. — Defendants were members of different firms of builders and furnishers of building materials. The employees in the building trades struck for a reduction in hours of work per day, but demanded

that the former wages be continued. To resist this demand defendants and other firms united in an agreement to refuse to supply building materials to any firm which should accede to the demands of the employees. Plaintiff refused to join with the defendants, and undertook to continue sales of building material to those builders who had conceded the eight-hour day. Defendants tried to prevent him from so doing by persuading lumber dealers and others from supplying him with the necessary materials. Plaintiff brings this suit averring an unlawful and successful conspiracy to injure him in his business. *Held*, (1) A combination of employers formed to resist an artificial advance in wages demanded by a combination of employees is lawful. (2) The methods used by defendants in this case do not amount to unlawful coercion. *Cote v. Murphy et al.*, 28 Atl. Rep. 190 (Penn.).

By the common law of Pennsylvania, a combination of employees to secure an advance in wages, was a conspiracy, but by legislative enactment it was subsequently declared lawful. Plaintiff claims that as these statutes do not embrace employers, a combination, such as the one in this case, is by the common law a conspiracy. The court, in an able opinion, draws the distinction between a combination of employers formed to reduce wages and one formed to resist an advance demanded. The element of an unlawful combination to restrain trade because of greed of profit to themselves or of malice towards plaintiff or others is lacking, and this is the essential element of common-law conspiracy in this class of cases. See *Com. v. Hunt*, 4 Metc. 111; *Bowen v. Matheson*, 14 Allen, 499; *Bohn Manuf. Co. v. Hollis*, 55 N. W. Rep. 1119; *Mogul S. S. Co. v. McGregor*, [1892] App. Cas. 25.

TORT — ABSOLUTE LIABILITY — INJURY TO PROPERTY BY WATER. — Defendants used in their brewery a large quantity of water for cooling beer and other purposes. This water after use was conveyed by a sewer box, built by defendants, down a street to a trough built by the city authorities. From this trough the water was discharged upon plaintiff's land. *Held*, that defendants were liable for the injury thereby occasioned. *Baltimore Breweries Co. v. Ranstead*, 28 Atl. Rep. 273 (Md.).

The defendant contended, in this case, that it was not liable unless the quantity of water so discharged was unreasonable and excessive. The court deny this, and say that "the principles laid down in *Fletcher v. Rylands*, L. R. 3 H. L. 330, are conclusive as to defendant's intention, the question being, not whether the quantity of water was excessive or unreasonable, but whether it did in fact come upon plaintiff's lot." In this country, there is much difference of opinion as to the soundness of the English rule, which the Supreme Court of Maryland follow in the principal case.

TRUSTS — FAILURE OF EXECUTOR TO CREATE TRUSTS ACCORDING TO THE WILL. — A testator left his estate to his executor in trust with a request that his own investments be continued so long as not detrimental to the estate. The income was to be applied to the use of the widow during her life. Upon her death the executor was to form four trust funds of \$20,000 each for the testator's four daughters and pay over the residue to his two sons. The executor had the option of paying the trust legacies for the daughters in money, and then investing it, or setting apart securities out of the estate of equal value. The widow received the income of the estate during her life, but on her death the executor did not form the four trust funds but kept the estate *in solido*, paying to each daughter the interest on \$20,000, and to the sons the balance of the income. Between his death and the death of the widow the estate greatly increased in value. The sons claimed the residue of the estate after deducting \$80,000 for the four daughters. *Held*, the sons could not take the entire increase, but each daughter must be allowed to participate in it in the proportion her share of \$20,000 bore to the value of the entire estate at the death of the widow. *Monson v. N. Y. Trust Co.*, 35 N. E. Rep. 945 (N. Y.). For a discussion of this case, see the Notes.

TRUSTS — POWER OF LEGISLATURE TO AUTHORIZE SALE BY TRUSTEES. — A testator devised his house to a church for a parsonage. In course of time the surroundings of the house became such that the intended use as a parsonage could not well be made. The General Assembly thereupon passed an act authorizing the church to sell the devised premises and invest the proceeds in a house lot more eligibly situated for a parsonage, to be held by the church upon the same trusts as the devised estate. *Held*, that such act is constitutional. *In re Van Horne*, 28 Atl. Rep. 341 (R. I.).

The decisions cited by the court, especially those in the cases of *Sohier v. Hospital*, 3 Cush. 483, and *Clarke v. Hayes*, 9 Gray, 426, are conclusive of the correctness of its opinion.

REVIEWS.

THE LAWS AND JURISPRUDENCE OF ENGLAND AND AMERICA. Being a Series of Lectures delivered before Yale University. By John F. Dillon, LL.D. Boston: Little, Brown, & Co. 1894. Octavo, pp. xvi. 431.

The main purpose of these lectures, as Judge Dillon says, is "to inspire a patriotic . . . regard for the laws and institutions of our country, . . . and to exhibit the excellences of our legal system." A book with such an object seems most welcome in days when the reaction from the old fetich worship of the common law is so strong.

In giving an historical sketch of the most salient features in the growth of the English law, the author has written a most interesting chapter on the Inns of Court. Certainly, to readers whose knowledge of these institutions, so important in English history, is confined, as is the case with most, to dim ideas gathered from "Pendennis," these pages will prove valuable. The strongest impression one gets from them is the great stimulus an English student must derive from life in the Inns of Court in the midst of the greatest lawyers of the kingdom. However thorough a legal education we in America may have, it is marred by the lack of intercourse with older men of our profession, and narrowed by a life passed simply with young men of our own age and occupations.

Judge Dillon makes the usual complaint about the rapid accumulation of law reports. He does not give Chief Justice Popham's reason for the trouble:—

*"Quæritur, ut crescent, tot magna volumina legis?
In promptu causa est, crescit in orbe dolus."*

But he says this tremendous multiplication of reports is inevitable under a system of pure judge-made law, and he advocates codification as a solution of the difficulty. And by codification is not meant an attempt to cover all imaginable transactions by statutory rules. He would favor: (1) Codification of portions of the law involving the more important and customary business relations,—such codification as is seen in the English "Bills of Exchange Act;" (2) statutory interference where the law is in great confusion, as in the law of partnership; (3) remedial statutes for the many useless distinctions, survivals from the feudal system, between the law of real and personal property. Whether or not Judge Dillon is sound in his views, he gives plausible reasons for what is undoubtedly the present tendency of the law, and deprives the word "codification" of some of the horror it has for many minds.

The book does not contain much original matter. Some of the general philosophizing in it is very conventional, and the style is at times unfortunately florid. It is, however, an interesting and suggestive book to any one who wishes to know the characteristics and needs of our law. Moreover, when Judge Dillon speaks about matters within his personal knowledge, like the jury system, codification, or methods of legal instruction, one feels that respect for his words due to a strong man of long professional experience.

A. N. H.

PRINCIPLES OF COMMON LAW PLEADING. By J. J. McKelvey. New York: Baker, Voorhis, & Company. 1894. pp. xx. 193.

The two standard works on Pleading are both excellent and satisfactory for their purposes, — Chitty as a well-arranged collection of authorities for the practitioner, and Stephen as a clear and adequate statement for lawyers and for more advanced students. There is, however, a demand for a third kind of text book, one which shall state clearly for the beginner in terms adapted to his slight knowledge of the law, the elementary principles which at least every well-educated lawyer must know in order to understand the history of the law and the decisions made during the long period when common-law pleading ruled the forms and affected the substance of the decided cases. This demand Mr. McKelvey has attempted here to supply. In Part I., some sixty-seven pages, he gives a clear statement of the essential principles of the different forms of actions, intended to make plain to the beginner the divisions into which the old remedies of this system of pleading naturally cast the substantive rights of action. In Part II., which occupies the rest of the book, he has followed the arrangement of Ames's Cases on Pleading in treating of the steps subsequent to the declarations in the respective actions. The net result is a plain and easily understood summary of the law of pleading.

The origin of the author's interest in the subject is well known; and this, although it bears no marks of being a second edition, is in great part a publication of the summary of pleading which was printed but not published by this author some years ago. The preface of this edition, while not mentioning that fact, acknowledges with apparent frankness the author's debt to Prof. J. B. Ames, and the body of the book bears out the acknowledgment by the frequency of reference to Ames's Cases. This debt to Professor Ames, owed and acknowledged by almost all the recent graduates of the school who have published books upon the law, is in Mr. McKelvey's case of a somewhat greater degree and different kind.

R. W. H.

A TREATISE ON THE LAW OF MORTGAGES ON PERSONAL PROPERTY. By Leonard A. Jones. Fourth edition, revised and enlarged. Boston: Houghton, Mifflin, & Co. 1894. pp. xv. 886.

Mr. Jones's books are justly popular because of the way in which he goes over the ground, telling all the law statutory and common without becoming confused in the maze of decisions, criticising as well as merely stating the cases, and thereby rendering more efficient help than is given by those who simply reduce cases to propositions. His thoroughness in going over all the law makes necessary frequent additions, which have averaged in this case about seventy-five pages to each new edition, and how necessary these additions are is neatly shown in this edition by a note to sect. 415, which sums up the history of the peculiar doctrine that a mortgagor's possession of mortgaged goods with power of disposal makes the transaction fraudulent *per se*. In 1881, when the first edition was published, the State courts or Legislatures which had settled the question stood fourteen in favor of the doctrine to thirteen against, in 1883 they were twelve to seventeen, in 1888 sixteen to seventeen, and now in 1894 they are reckoned twenty to twenty. So also such matters as the provisions regulating the registry of mortgages of personalty and those regulating foreclosure, redemption, sale under powers, and so on, make necessary specific statement of the laws of the different States.

The constant changes must be noticed and the statements corrected up to a late date, so that frequent editions of such a book are necessary. This one contains not only additions to the matter and references to the recently decided cases, but also the references to all the regular reports of each case, new or old, so far as is practicable, thus greatly increasing the facility of reference.

R. W. H.

A TREATISE ON THE LAW OF BUILDING AND BUILDINGS. By G. Partlett Lloyd. Second edition, revised and enlarged. Boston and New York: Houghton, Mifflin, & Co. 1894. pp. l. 537.

The first edition of this book seems to have met with success and the second now appears, brought down to date. While there is, of course, no law of Buildings in the sense in which there is a law of Torts or of Partnership, there is a great body of law here collected, so that one who has to do with buildings or their construction can turn readily to the authorities upon all the points which would naturally be raised in the course of such business. Mr. Lloyd has shown successful industry in bringing this law into a shape convenient for ready reference, and this edition should prove to be a good tool to work with.

On the settled points of law it would seem that the statements contained in it may safely be relied upon, but an examination of the author's statements of disputed points, such as the law of *Fletcher v. Rylands*, covenants (such as party-wall agreements) running with the fee, and others, indicates that a slight overconfidence in the unanimity of the courts of different States has led to an attempt to consolidate jarring decisions and so to obscurity. Either a bad instance of this or an exception to the general accuracy is the statement of the law of fixtures, which is bad to the core. This, while not vital in a book which deals principally with construction, mechanics' liens, and the like, might well be corrected in future editions. But these places are few, and in the body of the book plain and accurate statements are the rule.

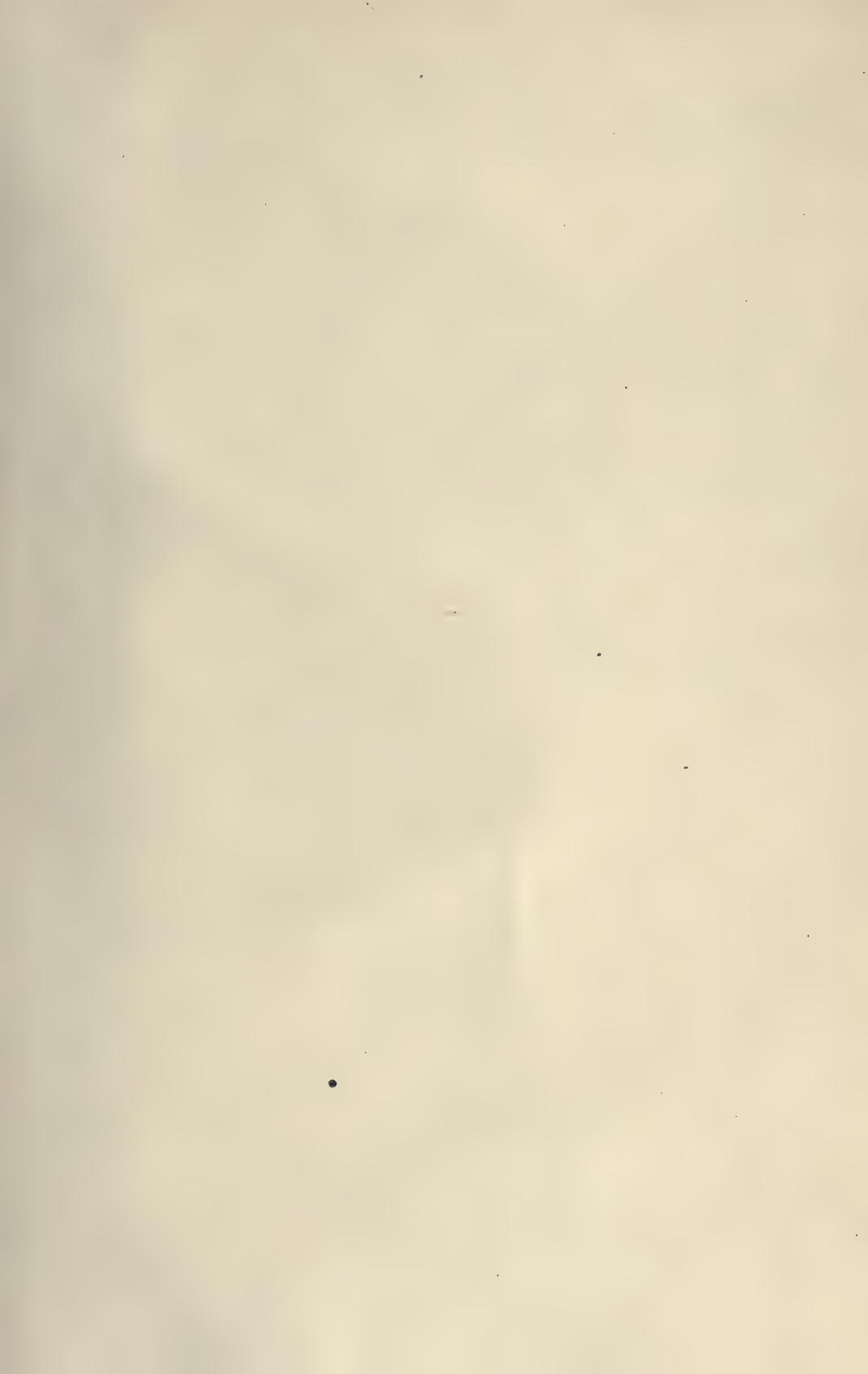
R. W. H.

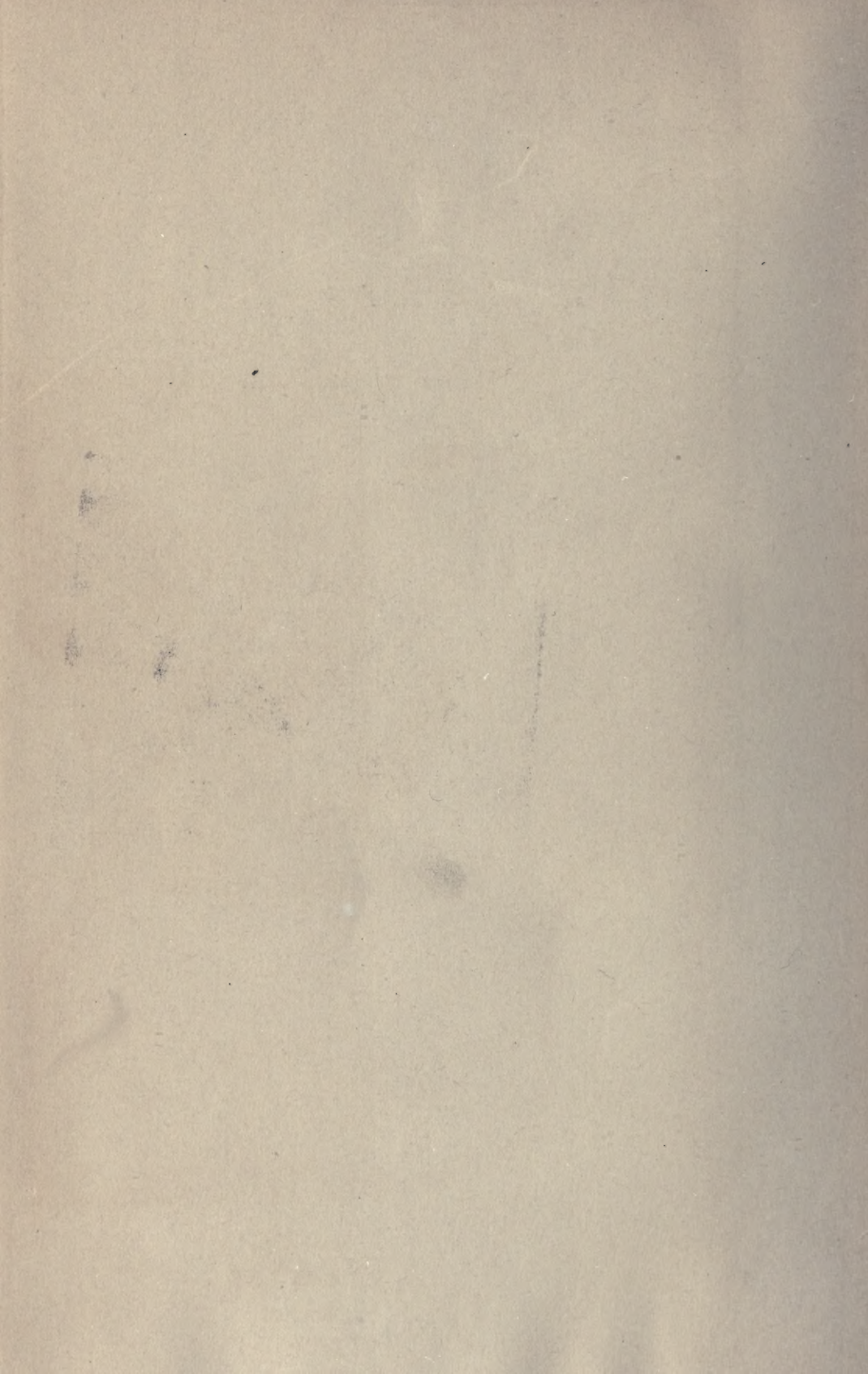
A TREATISE ON THE LAW OF LIENS, COMMON LAW, STATUTORY, EQUITABLE, AND MARITIME. By Leonard A. Jones. Second edition, revised and enlarged. Boston: Houghton, Mifflin, & Co. 1894. 2 vols. 8vo. pp. xcix. 703, 770.

This treatise first appeared six years ago, as the last of the author's admirable series on the general subject of property securities. The seven volumes which comprise the series — four on mortgages, one on pledges, and two on liens — constitute a most comprehensive and judicious treatment of this branch of the law, of which Mr. Jones is now regarded as the ablest expounder.

The new edition of this treatise on liens is timely. The classification is precisely the same. Much new matter has been added to the text relating to mechanics' liens, and over twelve hundred new cases cited on this one topic. The arrangement of the authorities by States in alphabetical order, both in the text and notes, affords an easy and ready reference to those who consult them. In 1893 the law of liens was changed in no less than fifteen States, and it is because of this frequency of legislation that the present edition will be welcome. Owing to minor changes, the size of the work is not materially increased.

H. A. R.





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